

53-02-
Seymour

Vol. V
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 606

LOUIS BUCHALTER, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF
NEW YORK

No. 610

EMANUEL WEISS, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 619

LOUIS CAPONE, PETITIONER,

vs.

PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF
NEW YORK

PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1942.
JANUARY 2, 1943.
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CERTIORARI GRANTED MARCH 15, 1943.

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Samuel Weiss—For Defts.—Direct

9715

SAMUEL WEISS, residing at No. 10 Monroe Street, in the Borough of Manhattan, City and State of New York, called as a witness in behalf of the defendants, after being duly sworn, testified as follows:

Direct examination by Mr. Talley:

Q. You are a brother of the defendant Mendy Weiss? A. Yes, sir.

Q. Are you presently in the service of the United States Army? A. Yes, sir.

9716

Q. You are what is generally known as a private? A. Selective draft.

Q. You are attached to your regiment where? A. At Fort Jackson, 13th Infantry.

Q. Fort Jackson is in South Carolina? A. Yes, sir.

Q. How long have you been in the service? A. March 29, 1941.

Q. You were drafted at that time? A. Yes, sir.

Q. You did not avoid the draft? A. No, sir.

Q. You did not try to be deferred? A. I did try to be deferred for two months or so.

9717

Q. After that you presented yourself and were selected for service? A. Yes, sir.

Q. Do you remember the night of the 12th of September, 1936? A. Yes, sir.

Q. Where was your place of business at that time? A. 226 East Broadway, New York.

Q. What was the business you were engaged in? A. Automobiles.

Q. How long prior to your being brought into the service were you in that business? A. Well,

9718

Samuel Weiss—For Defts.—Direct

I was in that business since 1935 to 1938, but before I was brought in the service I was not in business.

Q. Where did you say your place was? A. 226 East Broadway.

Q. Were you living at your mother's home at that time? A. Yes, sir.

Q. And where was that? A. No. 10 Monroe Street.

9719

Q. How far generally was No. 10 Monroe Street from 226 East Broadway? A. About seven or eight blocks.

Q. Were you in your place of business at 226 East Broadway at or around ten o'clock or 10:30 o'clock on Saturday night, September 12, 1936? A. Yes, sir.

Q. Did you see your mother there? A. Yes, sir.

Q. Did you see your brother Sidney Weiss? A. I did.

Mr. Turkus: I object to the leading questions.

9720

The Court: Objection sustained.

Q. Who did you see at your place of business that night? A. My mother came in; I saw my brother Sidney, and at about 10 o'clock or so my brother Mendy came in.

Q. Your mother was the first one to arrive? A. Yes, sir.

Q. Then who came next? A. My brother Sidney.

Q. Then, after Sidney came, and your mother

Samuel Weiss—For Defts.—Direct

9721

was there, you say Emanuel came in? A. Yes, sir.

Q. Did he come in a car? A. He pulled over in a car and he came in alone.

Q. He came in your shop alone? A. Yes, sir.

Q. Did you see who was in the car he came with?

Mr. Turkus: Objected to. The witness said he came alone.

9722

Q. I am speaking about the car—he said he came in his place of business alone.

Mr. Turkus: I object to that as leading.

The Court: Objection sustained.

Q. Was anybody in the car with your brother Mendy when he came there? A. Yes, sir.

Q. Who? A. His wife and her friend Dotty.

Q. Did you see them drive away? A. Yes, sir.

Q. Was Mendy driving the car? A. Yes, sir.

9723

Q. Who was in the car when he drove away?
A. My mother, my brother Sidney Weiss, Mendy's wife, this girl friend Dotty, and Mendy himself, driving.

Q. They drove away, you don't know where they went? A. No, sir.

Q. You remained in your place of business?
A. Yes, sir.

Q. At what time do you say it was when they drove away? A. About 10 o'clock.

9724

Samuel Weiss—For Defts.—Cross

Q. How do you fix in your recollection this night?

Mr. Turkus: I object to the form of the question.

The Court: Objection overruled.

A. It was my brother Sidney's birthday, and they were going out to celebrate.

9725

Mr. Turkus: People's Exhibit Z-26 for identification is offered in evidence.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not properly identified, not proper cross-examination.

Mr. Turkus: It has been identified by the preceding witness as a picture of this man, his own brother.

Mr. Talley: There is no theory upon which that can be admitted that I ever heard of.

9726

The Court: There is a theory, but it has not been developed.

Objection sustained.

Cross examination by Mr. Turkus:

Q. Look at the picture, Z-26 for identification, and tell this Court and jury if that is not your picture. A. The face is mine in the picture.

Q. The face is yours? A. Maybe—it is even darker than the rest of the picture. That is not my picture.

Q. You examined so much of People's Exhibit Z-26, for identification, as showed the face, that is your picture? A. The face is my picture.

Q. The body and the rest of the material thereon is not yours? A. No, sir.

Q. Didn't you take this picture yourself? A. I don't know the picture.

Q. Aren't you an amateur photographer? A. Yes, sir.

Q. Have you taken pictures of yourself? A. Sure, I have.

9728

Q. Isn't People's Exhibit Z-26, for identification, the face, body, and everything on it, one of the pictures you took yourself as an amateur? A. Is that the number you just called it?

Q. Yes. A. That is not my picture, sir.

Q. Did your brother Sidney Weiss talk to you after recess yesterday about this picture? A. He did not have—

Q. Yes or no, did he? A. I cannot answer that yes or no; he said the picture was—

Q. Just a minute. After recess yesterday—cannot you answer yes or no whether or not your brother spoke to you about a picture of you that he saw when he was on the witness stand? A. No, sir, I cannot say yes or no.

9729

By the Court:

Q. What can you say? A. With an explanation I can say.

Q. Go ahead. A. He said the picture is covered and the face as shown, it looked like me

9730

Samuel Weiss—For Defts.—Cross

because it had glasses. He did not know, he said he was not convinced.

By Mr. Turkus:

Q. The picture was not covered at all? A. That is what he said, just from the glasses.

Q. He said the picture was covered? A. He said it was held in such a way it was covered; all he could see was the glasses.

9731

Q. What was covered? A. That is the only thing he spoke to me about, the picture, and I know I had some pictures, not this kind, made in the regular process, that were stolen from the house—in fact, a lot of things were stolen from there. And I thought it may have been that picture, but I just discovered it.

Q. Didn't your brother say to you—now, answer this yes or no—that he saw a picture while he was on the witness stand yesterday? A. Yes, sir.

9732

Q. Didn't he tell you that he identified that picture as your picture? A. He did not say identified—he said—

Q. Yes or no. A. I cannot answer that; it is impossible.

Q. If you cannot answer yes or no, say so, and we will get along very well. A. I cannot answer it yes or no.

Q. Did you talk with anybody after you spoke to Sidney Weiss in connection with a picture which he saw in the court room? A. No, sir.

Samuel Weiss—For Defts.—Cross

9733

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Is the answer no? A. I said no.

Q. So the only one concerning whom you had a conversation yesterday with regard to the picture exhibited to your brother Sidney in court was Sidney himself, is that correct? A. That is right.

Q. You say you have taken pictures of your own before? A. That is right.

Q. Pornographic pictures?

9734

Mr. Talley: I object.

A. Pornograph?

Q. Don't you know what a pornographic picture is?

The Court: Indecent.

A. No, sir. I have never taken indecent pictures.

9735

Q. Did you ever take any lewd or indecent pictures of yourself?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. The suggestion conveyed in the District Attorney's question is improper and should not be permitted.

The Court: Objection overruled.

Mr. Talley: Exception.

9736

Samuel Weiss—For Defts.—Cross

A. No, sir, no indecent pictures.

Q.—You say certain papers were stolen from your home? A. That is right.

Q. Pictures of you? A. Pictures of me, yes, sir.

Q. Do you know who the thief was? A. No, sir.

Mr. Talley: I object.

The Court: Objection overruled.

9737

Mr. Talley: Exception.

Q. Don't you know— A. (Interrupting) Now, wait a minute, I said stolen. They were taken by the police authorities. I am sorry I said "stolen". I meant they were taken without my consent or without the consent of anybody. That is what I meant by "stolen".

Q. Were those police officers government agents? A. I don't know who they were.

9738

Q. Was the picture, People's Exhibit Z-26, for identification, one of the pictures removed from your home by the government agent? A. No, sir.

Mr. Talley: I object. He said it was not his picture.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you recognize the background of the picture?

Mr. Talley: I object.

Samuel Weiss—For Defts.—Cross

9739

The Court: Objection overruled.

Mr. Talley: Exception.

A. Just a chair.

Q. Do you recognize the chair? A. I do not see it complete.

Q. What part of it that you do see do you recognize? A. It may be one like we have at home; it may be, I am not sure.

Q. Look at that again and see if it is not one of the chairs you have home. A. I cannot see; that is a very poor picture.

9740

Q. That does not tell you, and you yourself are an amateur photographer—you have taken better pictures? A. Yes, sir.

Q. Better pictures of that style? A. No, sir, not of that style; I never took that picture.

Q. Do you recognize the portion of the chair nearest the foot of the person on People's Exhibit Z-26, for identification—the lace on it—as being a piece of lace on a chair in your home? A. I do not recognize it.

9741

Mr. Talley: I object. He is trying to get before the jury the contents of a paper not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Look at it. A. I do not recognize it.

Q. The chair that you have at home or did have at home, that looks similar to the chair in this portrait, does that have lace on it? A. No, sir.

9742

Samuel Weiss—For Defts.—Cross

The Court: Is that a tidy, an old fashioned tidy?

Mr. Turkus: You can look at it, Judge.

The Court (Examining picture): A tidy over the back of a barrel chair.

Q. At the Court's suggestion, do you recognize the thing called a tidy on the back of that chair?

9743

Mr. Talley: I object to this entire line of questioning while the paper is not in evidence in the case.

The Court: Objection overruled.

Mr. Talley: Exception.

(Question repeated by reporter.)

A. I do not.

The Court: There is another name for that besides barrel— I think it is "channel" back.

9744

Q. You are familiar with your body, aren't you?

Mr. Talley: I object. That is a silly question in the first place, and incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

The Witness: Of course, I am.

Q. Look at the chest and see if you recognize that in People's Exhibit Z-26, for identification.

Samuel Weiss—For Defts.—Cross

9745

Mr. Talley: I object, referring to a paper not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot see much of the chest.

Q. Look at it. A. I cannot see it

Q. I can see plenty of it. Look at it.

The Court: Look at the breast bone. Can you see that?

The Witness: I can see it, but I would not say it is mine.

9746

Q. Do you deny it is your chest?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you deny that the chest and the breast bone on People's Exhibit Z-26, for identification, is yours?

9747

Mr. Talley: I object to the testimony, inquiring about a matter not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. It is not mine.

Q. Have you got hair on your chest similar to the hair on the chest of People's Exhibit Z-26, for identification?

Mr. Talley: I think that emphasizes

9748

Samuel Weiss—For Defts.—Cross

the force of the objection I have made, and I object to it now.

Mr. Turkus: That is not an objectionable part of the picture.

Mr. Talley: The objection is he is endeavoring to get before the jury the contents of a paper not in evidence.

The Court: That part of it will do no harm. Objection overruled.

Mr. Talley: Exception.

9749

Q. Look at the formation of the hair on the chest.

Mr. Climenko: May I have a general objection to this line, and an exception to the admission of the answers to these questions?

The Court: Yes.

The Witness: That is not mine. I have more hair than that.

9750

Q. Look at the hair down to the stomach and see if you recognize that as being the hair on your own stomach.

Mr. Talley: Don't you see what we are getting before the jury—an attempt to get before the jury the contents of this paper which is not in evidence.

Mr. Turkus: We will not go any further on that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Samuel Weiss—For Defts.—Cross

9751

Q. Now, you wear glasses? A. Yes, sir.

Q. Did you ever sit in a channel chair of that type, nude?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, particularly upon the ground I stated before, that he is endeavoring to acquaint the jury with the contents of a photograph not in evidence in this case.

The Court: Leave out nude.

Mr. Talley: I object to the question.

Mr. Turkus: I withdraw the question.

9752

Q. Did you ever sit in a chair like that?

The Court: That is not an ordinary chair.

Q. Did you ever sit in a chair in your own home? A. I think we have something similar to it now.

Q. How long have you had such a similar chair in your own home?

9753

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot say it is a picture of this chair there—we have something like that, a back like that. We have one like that since 1934.

Q. Look at the rest of the picture and see if you can identify the rest of it as belonging to

9754

Samuel Weiss—For Defts.—Cross

your body—all of it. A. Absolutely no; only the face, that is all.

Q. You have had quite a bit of experience as an amateur photographer? A. No, sir, very little.

Q. Enough to take pictures of yourself? A. Yes, sir.

By the Court:

9755

Q. How do you do it? Tell the jury. A. I don't know what you mean. Your own picture?

Q. Yes. A. There is a self-timer on the camera—a self-timer is set and after the lapse of about ten seconds it will go on. It is built into the camera.

Q. You mean after setting it for ten seconds you would have to quickly take a pose? A. When the picture is taken, if there is any motion to your body, there is a failure.

Q. You don't have to use a pneumatic tube to squeeze? A. Yes, sir.

Q. What kind of a camera is it? A. What?

9756

Q. The one you used? A. At present I own an Ikonta B.

Q. How long have you used it? A. A short while.

Q. Before that what did you have? A. I had some other cameras.

Q. You always changed them? A. I can give you a list.

By Mr. Turkus:

Q. Have you ever posed for nude, incedent, pornographic pictures?

Samuel Weiss—For Defts.—Cross

9757

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, an attempt to get before the jury something which is not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No.

Q. Can you identify the handwriting on the back of People's Exhibit Z-26, for identification, the portion of it which has a name on it? A. The handwriting?

9758

Q. Yes. A. No, sir.

Q. Or the name? A. The name is my name.

Q. Do you know in whose handwriting it is?

A. No, sir.

Q. Look at the front of the picture and see if you can identify the numbers on the front as anybody's handwriting. A. No, sir.

The Court: Let me see that handwriting.

By the Court:

9759

Q. What is the size of that picture? A. About three inches by four and one-half.

Q. Do you have a camera of that size? A. No, sir.

Q. Did you ever have one of that size? A. No, sir.

Q. How many cameras have you had? A. Maybe seven or eight, maybe six; the smallest I had was two and a quarter by three and a

9760

Samuel Weiss—For Defts.—Cross

quarter—the one I have at the present time is two and a quarter square.

Q. You are in the Army, you have no time now, have you? A. It is a good size negative, two and a quarter square.

Q. That is quite small? A. No, sir, they have cameras thirty-five millimeters.

Q. You mean in the Army you cannot carry a large camera? A. No, sir.

9761

Q. What size do you say this is (indicating photograph)? A. This is about three by four and a quarter.

The Court: Three and a half by four and a half—one-eighth inch less than four and a half.

The Witness: That may be due to the size of the paper on which the print is—the negative may be larger.

9762

Q. Were you present at your home when a United States Government agent removed packages? A. No, sir.

Q. Who was, do you know? A. My mother and a friend of mine.

Q. Who is your friend? A. Louis Keltz.

Q. Where does Louis Keltz live? A. 2149 Clinton Avenue, Bronx.

Q. What is his business? A. He is in the auto rental business now.

Q. Did you ascertain whether the pictures were removed from your room as you heretofore stated? A. Well, he told me that many things were taken; he does not know what they were; they would not let him see.

Q. But, from your room? A. My pictures are kept in a desk.

Q. In your room? A. In the living room where I sleep.

Q. You slept in the living room and the pictures which were taken by the government agent were removed from the room in which you slept?

A. Yes, sir, pictures and other things.

Q. Now, as an amateur photographer, how do you account for your head being on the rest of this picture, People's Exhibit Z-26, for identification?

9764

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, too far afield.

The Court: Objection overruled.

Mr. Talley: Exemption.

A. Perhaps the District Attorney can explain. There is such a thing as trick photography. There is a lot of framing done. I did not do that.

9765

Q. So that you can account for it as being based on trick photography? A. I don't know; it may be. There are a lot of things that can be done with photographs. You can take ten pictures and make one out of them; you can add clothes to it where there originally were not any clothes.

Q. (By the Court) Do you know how that is done? A. No, sir, I have never done it. I have read about it.

Q. Look at People's Exhibit Z-26, for identification, can you say if you cannot recognize

9766

Samuel Weiss—For Defts.—Cross

some of the background as being the background of the picture of your own living room?

Mr. Talley: I object to that as already gone over.

A. Yes, there was a dark background there.

Q. What about that which appears to be a curtain, does that refresh your recollection?

9767

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I see no curtain.

Q. In the back of the head? A. There is no curtain in the back of the head.

Q. To the side of it—

Q. (By the Court) Is that there a tidy? A. That is no curtain; there is a tidy on the back of the chair and a tidy also on the arm of the chair.

9768

Q. What other background do you recognize there? A. What looks like a curtain. There is no curtain in the picture. That is peculiar, in place of a curtain.

The Court: It is not a curtain, that is a tidy.

Q. Before you took the witness stand today had you ever seen that People's Exhibit Z-26, for identification? A. Is that the picture (indicating)?

Q. Yes. A. Never.

Q. Do you recognize the left arm as being your left arm?

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9769

Mr. Talley: I object. It is an attempt to get before the jury the contents of a paper not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. The picture is not very clear and I cannot tell. I would say no.

The Court: Let us see the left arm. Do you mean the left arm or the right arm?

9770

Mr. Turkus: First we are asking about the left arm; then we will get to the right arm later.

Q. (By the Court) Do you recognize the arm?

A. I think I answered that.

Q. Do you know whether it was necessary for a nude man to take this picture? A. I do not know who it was; I never saw him.

Q. Look at the fingers on the right hand. Does that help refresh your recollection as to whose hand it is?

9771

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot tell; it is not mine.

Q. How do you account for the picture of your head, which you admit was taken, with your eyes closed?

Mr. Talley: I object. He is not called upon to account for it; it is incompetent, immaterial.

9772

Samuel Weiss—For Defts.—Cross

The Court: Objection overruled.

Mr. Talley: Exception.

By the Court:

Q. Can you account? A. I can.

By Mr. Turkus:

9773

Q. Can you account how the eyes in the picture, People's Exhibit Z-26, for identification, are focused upon some other part of the picture, People's Exhibit Z-26, for identification, if the head alone is yours?

Mr. Talley: I object. It is an effort to get before this jury the contents of a paper which is incompetent, immaterial and irrelevant.

The Court: Objection sustained.

The Witness: Can you see the eye?

9774

Q. Did you at any time assume the position and do the act portrayed on People's Exhibit Z-26, for identification?

The Court: No, not that.

Mr. Talley: I object to it as highly improper. I think your Honor should terminate this type of examination.

The Court: The Court terminates it right now. That is as far as you can go.

Mr. Turkus: I am through with the witness then.

Mr. Talley: If your Honor please, in view of this persistent examination that

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9775

has been conducted by the District Attorney, I move for the withdrawal of a juror and the declaration of a mistrial because it is so highly prejudicial and I don't believe a fair trial can be given to these defendants hereafter.

The Court: Motion denied.

Mr. Talley: Exception.

DOROTHY ISAACSON, residing at 148 Clinton Street, Borough of Manhattan, City and State of New York, called as a witness on behalf of the defense, after being duly sworn, testified as follows:

9776

Direct examination by Mr. Talley:

Q. Mrs. Isaacson, do you know the defendant Mendy Weiss? A. Yes, sir.

Q. And you know his wife? A. Yes, sir.

Q. How long have you known his wife? A. Over twelve years.

Q. Were you brought up in the same neighborhood together? A. Yes, sir.

Q. Down in the lower East Side of New York, in the Borough of Manhattan? A. Yes, sir.

Q. Have you kept up your acquaintance with her during the past twelve years? A. Yes, sir.

Q. You and she are very good friends? A. Yes, sir.

Q. Do you remember the night of September 12, 1936? A. Yes, sir.

9777

Q. In whose company were you that night? A.

9778

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Blanche, Mendy Weiss, his mother, Sidney and myself.

Q. Where were you before ten o'clock on that night? A. At Blanche's apartment.

Q. Blanche is Mrs. Mendy Weiss? A. Yes, sir.

Q. Were you visiting her there? A. Yes, sir.

Q. Had you frequently visited her there? A. Yes, sir.

Q. Did you stay at her house previous to that date? A. Yes, sir.

9779

Q. And over night? A. Many times.

Q. You are a frequent visitor there? A. Yes, sir.

Q. What happened that evening with respect to your going out any place? A. Well, Blanche told me that Mendy was going to pick her up later in the evening and we were going out to celebrate Sidney's birthday.

Q. She invited you to go out to celebrate Sidney's birthday? A. Yes, sir.

Q. Did you and Mrs. Weiss leave the house together? A. Yes, sir.

9780

Q. With whom? A. With Mendy.

Q. Did he call for you? A. Yes, sir.

Q. Do you remember at what time he called for you? A. At about nine o'clock.

Q. At night? A. Yes, sir.

Q. Did he have a car? A. Yes, sir.

Q. Did you and Mrs. Weiss—

Mr. Turkus: I object to counsel leading the witness now; it is leading and suggestive.

The Court: Sustained. Reframe your question.

Dorothy Isaacson—For Defts.—Direct

9781

Q. Did you go somewhere with Mendy Weiss?

A. Yes, sir.

Q. Where did you go? A. We got into the car and we drove down to Sammy Weiss's store.

Q. Who was driving the car? A. Mendy.

Q. You and Mrs. Weiss got in the car? A. Yes, sir.

Q. You drove to Sammy's place? A. Yes, sir.

Q. Do you remember where that was?

Mr. Turkus: Objected to as repetitious and leading.

9782

Mr. Talley: It is not leading if you ask where the place was. Nothing can be less leading than that.

The Court: Objection overruled.

A. Yes, sir.

Q. Where? A. On East Broadway.

Q. When you got there did Mendy do anything? A. Yes, sir.

Q. What did he do. A. He walked out of the car and over to the store.

Q. What store did he walk to? A. To the place, the auto rental.

9783

Q. Is that Sammy's place of business? A. Yes, sir.

Q. Did you and Mrs. Weiss remain in the car?

A. We did.

Q. Did you see Mendy go into Sammy's place?

A. Yes, sir.

Q. Did anybody come out of Sammy's place and get into the car? A. Yes, sir.

Q. Who did? A. Mendy's mother and Sidney.

Q. Then did Mendy get into the car? A. Yes.

9784

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Mr. Turkus: Objected to as leading and suggestive.

The Court: Objection sustained.

Q. Who got in the car?

Mr. Turkus: Objected to as already answered.

9785

Mr. Talley: You object to it first as leading, and then when I ask a question to lead up to it, you object.

Mr. Turkus: She said the mother and Sidney got in the car.

Q. Who get in the car with Mendy? A. Mrs. Weiss and Blanche.

The Court: Let us get this straightened out. Who did you say it was? Mrs. Weiss, the mother, Blanche and Mrs. Weiss and yourself?

The Witness: At Blanche's home?

9786

By the Court:

Q. Yes. A. Just Blanche and myself and Mendy came and called for us.

By Mr. Talley:

Q. I think we had better call Mendy's wife Blanche and Mrs. Weiss, the mother; there are two Mrs. Weisses. Bear in mind one is Mendy's wife and the other the elderly Mrs. Weiss, the mother of these boys.

Q. Now, do you know at what time it was

when you drove away from Sammy's place? A. It must have been about ten o'clock, somewhere around that time.

Q. Where did you go? A. We drove uptown.

Q. Who drove the car? A. Mendy.

Q. Where uptown did you go to? A. We went to the Brass Rail.

Q. Do you remember where that was? A. 7th Avenue and 49th Street.

Q. 49th Street? A. Around that place.

Q. Now, when you got to the Brass Rail at Broadway and 49th Street—that is Manhattan?

A. Yes, sir.

Q. What did you do? A. Blanche, Sidney, Mrs. Weiss and myself got out of the car, and Mendy went to park the car.

Q. Then, did Mendy come back without the car? A. Yes, sir.

Q. Where did you go then? A. We went into the restaurant.

Q. Do you know what time it was you got into the restaurant? A. I could not remember just what time we got in the restaurant.

Q. What is your best estimate of the time? A. It must have been about a quarter to 11 o'clock, around that time.

Q. Did you have something to eat in the restaurant? A. Yes, sir.

Q. Were all those persons you have mentioned present in the restaurant? A. Yes, sir.

Q. Sitting at the same table? A. Yes, sir.

Q. How long did you remain in the Brass Rail Restaurant? A. Over an hour it must have been.

9790

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Q. That would bring it to approximately 12 o'clock? A. About that.

Q. At 12 o'clock did you go any place? A. Yes, sir.

Q. Where do you remember going? A. To the movies.

Q. What theatre? A. The Capitol Theatre.

Q. That is on 7th Avenue? A. Broadway and 50th Street.

9791

Q. Did you ride or walk to the Capitol Theatre from the Brass Rail? A. We walked.

Q. Did you all, all that you have named, go into the moving pictures? A. Yes, sir.

Q. Mendy was with you? A. Yes, sir.

Q. And the elderly Mrs. Weiss? A. Yes, sir.

Q. And Sidney? A. Yes, sir.

Q. And Blanche? A. Yes, sir.

Q. Did you remain for the entire picture? A. Yes, sir.

Q. What time did you get out? A. I don't know; I do not remember exactly.

9792

Q. What is your best recollection? A. It must have been past two o'clock.

Q. You saw the entire program, did you, in the Capitol Theatre? A. Yes, sir.

Q. Then, after you came out of the Capitol Theatre, at the time you say must have been two o'clock, where did you go? A. We took a drive through the park, Central Park.

Q. This was September 12, 1936? A. Yes, sir.

Q. Was the weather warm, cool, cold, or rainy or what? A. I don't remember what the weather was.

Q. When you took the ride through Central

Park where did you go then? A. Then we drove downtown.

Q. After you left Central Park? A. Yes, sir.

Q. How far downtown did you go and where did you go? A. We went to the East Side, we went to a restaurant, Ratner's.

Q. Where is Ratner's? A. On Delancey Street.

Q. That is away over on the extreme East Side of lower Manhattan? A. Yes, sir.

Q. Did you go into the restaurant? A. Yes, sir. 9794

Q. How long did you remain there? A. Anywheres from three-quarters of an hour to one hour.

Q. What time would you say it was when you came out of that restaurant? A. About four o'clock.

Q. Were all of you still together in the party? A. Yes, sir.

Q. Were you celebrating Sidney's birthday? A. Yes, sir.

Q. After you came out of that restaurant at approximately four o'clock, where did you go? 9795

A. We drove Mrs. Weiss and Sidney home.

Q. When you say Mrs. Weiss, you mean the elderly Mrs. Weiss and Sidney? A. Yes, sir.

Q. Do you remember where they lived? A. Yes, sir.

Q. Where? A. At No. 10 Monroe Street.

Q. That is in the lower East Side also? A. Yes, sir.

Q. Did you deposit Mrs. Weiss and Sidney at that address? A. Yes, sir.

Q. You left them there? A. Yes, sir.

9796

Dorothy Isaacson—For Defts.—Direct

Q. Was Mendy still driving the car? A. Yes, sir.

Q. Did anybody drive that car that night except Mendy Weiss? A. No, sir.

Q. After you left the elder Mrs. Weiss and Sidney at their home on Monroe Street, where did you go then? A. Then we drove up to Blanche's home.

Q. Blanche's home was Mendy's home? A. Yes, sir.

9797

Q. Where was that? A. On 21st Street.

Q. And what avenue? A. 2nd Avenue.

Q. In Manhattan? A. Yes, sir.

Q. Did you then go upstairs to Mendy's apartment? A. Yes, sir.

Q. At what time was it when you arrived there? A. It was about four o'clock.

Q. What did you do after you got into Mendy's apartment? A. We spoke for a while and then we started to prepare to go to bed.

Q. Did you go to bed? A. Yes, sir.

9798

Q. Where did you sleep that night? A. I slept in the living room.

Q. On a couch? A. Yes, sir.

Q. Had you slept there before? A. Yes, sir.

Q. What did you see Mendy and Blanche do there? A. Well, they went to the bedroom and got undressed and went to bed too.

Q. Was the bedroom adjoining the living room? A. Yes.

Q. Did you see Mendy Weiss go in the bedroom? A. Yes, sir.

Q. Did you see Blanche go in the bedroom? A. Yes, sir.

Q. You say this was after four o'clock? A. Yes, sir.

Q. Did you go to sleep? A. Yes, sir.

Q. When you woke up what happened? A. When I woke up Blanche was already up.

Q. Was she getting breakfast? A. She was starting to prepare it.

Q. Did you see Mendy there? A. Yes, sir.

Q. When? A. I was still lying on the couch when Mendy walked into the living room and I pretended I was asleep and he started playing around with me.

9800

Q. That evoked laughter from the rear of the court-room. Will you tell us what you mean by that? A. He started pulling my hair and tickling my toes and tried to get me off the couch.

Q. Tried to get you up? A. Yes, sir.

By the Court:

Q. What time was that? A. That was about near 12 o'clock.

Q. Noon? A. Yes, sir.

By Mr. Talley:

9801

Q. That would be around 12 o'clock noontime, Sunday, September 13th? A. Yes, sir.

Q. Did you then get up? A. Yes, sir.

Q. Did you have your breakfast? A. I did.

Q. Did you have it with Blanche and Mendy? A. Yes, sir.

Q. Where did you have your breakfast? A. In the dining alcove.

Q. That is adjoining the kitchen and living room? A. No.

9802

Dorothy Isaacson—For Defts.—Cross

Q. Adjoining the kitchen? A. Yes, sir.

Q. How long did it take for your breakfast at that time? A. It must have been an hour or so.

Q. Then where did you go then, do you remember? A. Then we all started to get dressed.

Q. Yes. A. And they brought me downtown, and Blanche and Mendy went to visit her father.

Q. Where did they leave you? A. In front of my house.

9803

Q. You were still in Mendy's car, were you? A. Yes, sir.

Q. When you last saw them, Mendy and Blanche were in the car together? A. Yes, sir.

Q. Did you see them drive off? A. Yes, sir.

Q. What time do you say it was when they left you at your house? A. It must have been after two o'clock.

Q. On Sunday afternoon? A. Yes, sir.

Q. Mrs. Isaacson, at this time, September 12th, September 13th, 1936, you were married? A. Yes.

9804

Q. And on that precise date where was your husband? He was away.

Q. Where? You mean in prison? A. Yes.

Q. You say you had frequently stayed overnight with Mrs. Mendy Weiss? A. Yes, very often.

Q. In that house? A. Yes.

Mr. Talley: You may examine.

Cross-examination by Mr. Turkus:

Q. Madam, what month, what day, and what year was it that Mendy Weiss tickled your toes

Dorothy Isaacson—For Defts.—Cross

9805

and pulled your hair? A. He did that all the time.

Q. What? A. He did that all the time.

Q. Oh, that was not unusual for him to be so playful? A. No.

Q. Can you remember the particular month, the particular day and the year that Mendy Weiss tickled your toes in the living room when you pretended to be asleep? A. Well, I said he did that all the time that I stayed over there.

Q. Did you always pretend to be asleep when Mendy came out? A. I don't know whether I always pretended but I know I did it quite often.

9806

Q. You were a little coy about it?

Mr. Talley: I object to that, if your Honor please, manifestly improper.

The Court: Sustained.

Mr. Talley: Let us get down to this lawsuit.

Q. Picture Z-27 for identification, is that a picture of your husband?

9807

Mr. Talley: I object to that as immaterial, incompetent, irrelevant; cannot see what possible bearing that would have upon this case.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. How do you spell your last name? A. (Spelling) I-s-a-a-c-s-o-n.

Q. How many years are you married? A. Eighteen.

9808

Dorothy Isaacson—For Defts.—Cross

Q. During the eighteen years that you have been married, how many different names did you live under? A. None.

Q. Did you live under the name of Levine with your husband? A. Never.

Q. Did you live under the name of Rosen? A. No.

Q. Did you live under the name of Roth? A. No.

Q. Did you live under the name of Greenberg? A. No.

9809

Q. Under the name of Mirrin? A. No.

Mr. Talley: I object, if your Honor pleases, to any further enumeration of these names. The witness has stated she never lived under any other name than her own.

Mr. Turkus: Cross-examination.

Mr. Talley: That does not justify it.

Mr. Turkus: I am trying to refresh her recollection.

Mr. Talley: That is not the way to do it.

9810

The Court: Overruled.

Mr. Talley: Exemption.

Q. Did you ever live at 342 East 5th Street? A. No.

Q. Where did you live in 1936? A. 235 Henry Street.

Q. East Side, Manhattan? A. Yes.

Q. Do you live there with your husband now? A. Yes.

Q. You say you know Mendy Weiss and Blanche Weiss for about twelve years? A. Yes.

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9811

Q. Did there come a period of time when you did not visit at their home frequently? A. No.

Q. Did you visit at their home between April, 1940, and April, 1941? A. No, I did not see them at all at that time.

Q. I don't hear you. A. I did not see them at all at that time.

Q. Did they tell you that they were leaving town? A. No.

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

9812

The Court: Sustained.

Q. When before April, 1940, was the last time you visited at the home of Mr. and Mrs. Mendy Weiss? A. Must have been in January.

Q. And where did they live in January of 1940? A. 46th Street in Brooklyn.

Q. 46th Street in Brooklyn? A. Yes.

Q. Do you know what other avenue it was? A. I think it was 11th or 12th. I don't remember.

9813

Q. Did they live there under the name of Newman?

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Not proper cross-examination. Exception.

A. Yes.

9814

Dorothy Isaacson—For Deft.—Cross

Q. You visited them there knowing that they were living under an alias? A. Yes.

Q. Did you visit at 230 Park Place when they lived there under the name of Hoffman?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

9815

A. Yes.

Q. How often did you visit Mendy Weiss and his wife Blanche when they were living under the name of Newman? A. Once or twice a week.

Q. Did you sleep at that 46th Street apartment in Brooklyn? A. No, that was the only apartment I had never stayed over at.

Q. Did the alias Newman have anything to do with that? A. No.

Q. If you had been invited to sleep over when they lived under that alias, you would have accepted?

9816

Mr. Talley: Objected to as being purely conjecture.

The Court: Sustained.

Q. At 230 Park Place when they were living as Mr. and Mrs. Hoffman, you visited there knowing they were living under an alias? A. Yes.

Q. You slept there at 230 Park Place? A. Yes.

Q. In all how many times did you sleep at Park Place? Was that about once or twice a week? A. Maybe.

Dorothy Isaacson—For Defts.—Cross

9817

Q. During the frequent times that you visited, without including the times you slept over, did you see visitors at the home of Mr. and Mrs. Mendy Weiss? A. A family of his.

Q. Other than the family? A. No.

Q. Do you know Charley (The Bug) Workman?

Mr. Talley: I object, if your Honor pleases, incompetent, irrelevant and immaterial. We are going to have this enumeration of names again.

9818

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Never heard of him? A. I have read about him.

Q. See if you remember seeing him in the apartment. I will show you a photograph which may refresh your recollection. Take a look at this photograph and see if you recognize that as the face of a man you saw in the Weiss apartment?

9819

Mr. Talley: I object to it, if your Honor pleases, incompetent, irrelevant, immaterial. I likewise object to a display of photographs numbering at least twenty that are now on display on the table of the District Attorney, in plain view of the jury, obviously Rogues Gallery photographs, the table upon which they rest being exactly up against the rail of the jury box. I would like your Honor to look at them. They have been gone over

9820

Dorothy Isaacson—For Defts.—Cross

one after the other in the presence and in the sight of the jury before this question was asked.

Mr. Turkus: Will your Honor note the fact that the table is below the rail and that this is no display intended for the jury's eyes at all.

The Court: They are in a disordered heap but just the same I suggest you keep them in a pack like playing cards and have them covered.

9821

Mr. Talley: Now I ask your Honor to rule upon my objection to this question.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. You don't remember? Don't you remember seeing him at 230 Park Place?

Mr. Talley: I object, if your Honor pleases. The witness has seen a photograph, not identified, not in evidence, has testified she had never seen the subject of that photograph. Any further examination upon it is improper.

The Court: Overruled.

Mr. Talley: Exception.

9822

A. I don't remember.

Q. How long do you know Allie Tannenbaum?

Mr. Talley: That is objected to as incompetent, irrelevant and immaterial.

A. I don't.

Dorothy Isaacson—For Defts.—Cross

9823

Q. Take a look at this picture and see if you knew him as a visitor at the Mendy Weiss home when he lived under the name of Hoffman in Park Place?

Mr. Talley: I make the same objection. There is no evidence as to whose photograph it is. The paper is not in evidence, improper method of cross-examination, improper question.

The Court: Overruled.

Mr. Talley: Exception.

9824

A. No.

Q. Never saw that man before? A. In Mrs. Weiss' apartment?

Q. Anywhere? A. No.

Q. What was the question intended to mean "In Mrs. Weiss' apartment?" A. I don't know.

Mr. Talley: Objected to, if your Honor please, incompetent, irrelevant and immaterial.

The Court: Overruled.

9825

Q. Were you in doubt?

Mr. Talley: Let me have a ruling, please?

The Court: Overruled.

Mr. Talley: Exception.

A. I don't know.

Q. You asked me "In Mrs. Weiss' apartment?" Were you in doubt? A. I thought that

9826

Dorothy Isaacson—For Defts.—Cross

that was what you meant, whether I had seen him in Mrs. Weiss' apartment.

Q. Yes. A. Well, I have not.

Q. Or anywhere else? A. No.

Q. Do you know Farvel Cohen? A. Yes.

Q. How long do you know Farvel Cohen? A. A few years.

Q. How many years? A. I don't know just how many.

9827 Q. Speak up. A. I don't know just how many years.

Q. More than ten? A. No.

Q. More than five? A. About that.

Q. How many times did you see him as a visitor up in the Weiss' home?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial. It was not her home; she was visiting there.

The Court: Overruled.

Mr. Talley: Exception.

9828 A. I never saw him up there either.

Q. Where did you see Farvel Cohen in the five years that you have known him? A. I see him around in restaurants I used to come into downtown.

Q. What restaurants downtown? A. Ratner's.

Q. Yes. A. Blum's, that's all.

Q. How about the one at Grand and Lewis? Did you ever see him in Lewis Bar & Grill? A. I never went to that one.

Q. Did you ever go out in the society or company of Farvel Cohen?

Dorothy Isaacson—For Defts.—Cross

9829

Mr. Talley: That is objected to, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Was your husband with you on those occasions? A. Not on all of them.

Q. Were there any other gangsters in the party when you were with Farvel Cohen?

9830

Mr. Talley: I object, if your Honor pleases, to the form of the question as being improper, incompetent, irrelevant and immaterial.

The Court: Sustained as to form.

Q. Were there any other disreputable people in the party?

Mr. Talley: Same objection.

The Court: People known to her to be disreputable or so understood by her, she can answer. In its present form that is objectionable. Sustained.

9831

Q. Who were the other people with whom you went out when you were in the company of Farvel Cohen?

Mr. Talley: That is objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. His wife.

9832

Dorothy Isaacson—For Defs.—Cross

Q. Anyone else? You went out with Farvel Cohen and his wife when you were not out with your husband? A. Yes.

Q. Any other man in your company? A. No.

Q. Any other men in the party? A. No.

Q. Did you know Dimples Wolinsky?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

9833

Mr. Talley: Exception.

A. No.

Q. Look at this photograph and see if you recognize it?

Mr. Talley: Make the same objection that I made to the previous photograph.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Climenko: If your Honor pleases, may I have a general objection and exception to this line of interrogation?

9834

The Court: Yes.

Mr. Climenko: So that I may not interrupt.

The Court: Yes, and a standing exception.

Mr. Climenko: Thank you, sir.

Q. Do you recognize the individual on that photograph? A. I don't.

Q. Did you know Cuppie Migden? A. No.

Q. Did you know any other persons from the East Side of Manhattan?

Dorothy Isaacson—For Defts.—Cross

9835

Mr. Talley: Same objection, if your Honor pleases. Rather ludicrous question it seems to me; incompetent, irrelevant.

The Court: She lived there.

Q. Did you know any persons from the East Side of Manhattan who visited Mr. and Mrs. Mendy Weiss?

Mr. Talley: Same objection.

Q. On the occasions when you were there?

9836

Mr. Talley: Same objection, too general; incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Outside of the family, do you know a single visitor who visited Mr. and Mrs. Mendy Weiss on the occasions when you were there?

9837

Mr. Talley: Same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you ever ask Mr. or Mrs. Mendy Weiss why they were living on 46th Street in Brooklyn under a false name, Newman?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

9838

Dorothy Isaacson—For Defts.—Cross

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you ever ask Mr. and Mrs. Mendy Weiss when they lived at 230 Park Place why they lived there under the false name of Hoffman?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

9839

A. No.

Q. Were you at all interested in their conduct?

Mr. Talley: Same objection, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

9840

A. I approved of their conduct.

Q. So that you approved of the conduct of Mendy Weiss and Blanche Weiss? A. Yes.

Q. And it met with your full approval that they lived in various places in New York City under aliases?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial, whether she did or not.

The Court: Overruled.

Mr. Talley: Exception.

A. If they did I never asked them the reason why but they probably had their own reasons.

Dorothy Isaacson—For Defts.—Cross

9841

Q. Yes, and whatever those reasons were they met with your approval? A. I did not know their reasons. I never asked.

Q. Did you make any inquiry as to their reasons?

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: She said she never asked.

Q. Did you ever ask anybody concerning the reasons — answer this yes or no — that your friends were living under the aliases in different parts of the city?

9842

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did the business in which Mendy Weiss was engaged meet with your approval?

Mr. Talley: I object to that. It is incompetent, irrelevant and immaterial. It would not make any difference whether it did or not.

9843

The Court: Overruled.

Mr. Talley: Exception.

A. I did not know his business.

Q. And not knowing his business, it met with your approval that you slept over at his home and visited there?

9844

Dorothy Isaacson—For Defts.—Cross

Mr. Talley: I object to that.

Q. Is that it?

Mr. Talley: False conclusion. It has no bearing upon the impeachment of this witness.

Mr. Turkus: May we have simple objections, your Honor?

Mr. Talley: It is an erroneous question, should not be permitted.

9845

The Court: Sustained.

Q. Did you at any time in the twelve years that you knew Mendy Weiss and Blanche Weiss and visited there once or twice a week and slept over-night, know Mendy Weiss' business?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

9846

A. No.

Q. Did you have the slightest interest in what business he was engaged when you were a constant visitor at his home?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Was it any of your concern with whom Mendy Weiss associated?

Dorothy Isaacson—For Defts.—Cross

9847

Mr. Talley: I object to it as incompetent, irrelevant and immaterial.

Mr. Turkus: As affecting her credibility.

The Court: Sustained.

Q. This friendship of twelve years that you had with Mendy Weiss and Blanche, did you hear anything from them by way of letters, telephones, or telegrams from April, 1940, until April, 1941?

9848

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you get a single letter, post card, or other communication of any kind, nature, or description, directly or indirectly, from your twelve year friends?

Mr. Talley: I object to it and object to the form of the question. I object to it on the ground that it has already been answered; incompetent, irrelevant and immaterial.

9849

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you make any efforts to locate your friends of twelve years between April, 1940, and April, 1941?

9850

Dorothy Isaacson—For Defts.—Cross

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you make any inquiry as to the whereabouts of your twelve year friends, Emanuel and Blanche Weiss?

9851

Mr. Talley: Same objection.

Q. During the period of April, 1940, to April, 1941?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. The only time—

Q. Did you, madam, make any inquiry? Yes or no. A. How can I say yes or no when I want to tell you how I inquired when I did?

9852

Q. Well, if you did inquire the answer is yes; if you did not inquire the answer is no. A. Yes.

Q. From whom did you make inquiry and when?

Mr. Talley: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. From her family.

Q. Her family? Did you go to Rose Simon's, her sister? A. No.

Q. Who in her family did you go to?

Dorothy Isaacson—For Defts.—Cross

9853

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I met her other sister.

Q. What is her name? A. Jennie.

Q. Jennie what? A. I don't remember her second name.

Q. Where did you meet Jennie?

Mr. Talley: Objected to as immaterial, irrelevant, too remote.

9854

The Court: Overruled.

Mr. Talley: Exception.

A. On the East Side.

Q. Where on the East Side did you meet Jennie?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember just where.

9855

Q. Well, that was between the period of April, 1940, to April, 1941, far less than 1936. Can't you recall?

Mr. Talley: Object to the question. The form of the question is argumentative.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

9856

Dorothy Isaacson—For Defts.—Cross

Q. I do not hear you, madam. A. No.

Q. Was it in a house? Was it on the street? Was it in some kind of premises? A. On the street.

Q. Was the meeting with Jennie a coincidence? A. Yes.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

9857

Q. You were not searching for Jennie? A. No.

Q. Where had you met Jennie before that? A. Her home.

Q. At Jennie's home? A. Yes.

Q. Do you remember her last name now? A. I just can't think of it.

Q. Meeting Jennie in this coincidental meeting as it were, did you ask for the whereabouts of Emanuel and Blanche Weiss?

9858

Mr. Talley: Object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Is that the only inquiry you made about their whereabouts? A. The only one I can remember.

Q. Were you furnished with an address by Jennie?

Mr. Talley: I object to that, hearsay

Dorothy Isaacson—For Defts.—Cross

9859

information at best but incompetent and immaterial.

Mr. Turkus: That only calls for a yes or no answer.

Mr. Talley: Never mind what it calls for. It is an improper question.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. You did not go to the home of Mendy Weiss' mother for the address, did you?

9860

Mr. Talley: Objected to.

A. No.

Q. You did not go to the home of Sidney Weiss, whose birthday party you attended, for the address of your twelve year friends?

Mr. Talley: Same objection, as immaterial and irrelevant what she did.

The Court: Overruled.

Mr. Talley: Exception.

9861

Q. Did you? A. No.

Q. When for the first time did you see Mrs. Blanche Weiss, the wife of Mendy, after April of 1941? A. During the month of April.

Q. Yes, when during the month? A. I don't remember just what day.

Q. The early part of the month? A. No, it was the latter part of the month.

Q. And where did you meet her? A. I met her in Atlantic City.

9862

Dorothy Isaacson—For Defts.—Cross

Q. Were you there with your husband? A. No.

Q. What hotel were you at?

Mr. Talley: Objected to as immaterial, irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

A. At the Breakers.

9863

The Court: When was this?

The Witness: The latter part of April.

Mr. Turkus: Latter part of April, 1941.

Q. Under what name were you registered?

Mr. Talley: Objected to as immaterial and irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

A. I did not stop there.

9864

Q. Where were you stopping? A. Well, Blanche checked out too and then we went to some small place.

Q. Blanche checked out of the Breakers? A. Yes.

Q. Where had you been registered before she checked out of the Breakers? A. I had just come into Atlantic City.

Q. Was she alone? A. Yes.

Q. And from the Breakers, when she checked out, where did you and Blanche go to? A. We went to some small hotel.

Q. What is the small hotel? A. I don't remember. It was not even a hotel. It was a boarding house.

Q. What street was the boarding house on? A. I don't remember.

Q. What was the name of the proprietor of the boarding house? A. I don't remember.

Q. Is there any way you can identify the boarding house that you stayed in from any other boarding house in Atlantic City? A. Not unless I went there.

9866

Q. How long did you stay at the boarding house? A. Ten days.

Q. Don't you know what street it is on? A. I just can't remember. I think it was Atlantic Avenue.

Q. Near what other street was it? A. Pacific Avenue.

Q. During the ten days can't you tell us a better location than that? A. No.

Q. That is the best you can do with it? A. Best of my recollection.

Q. During that ten day period that you were down in the boarding house in Atlantic City, did anybody else join the party?

9867

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; has no bearing upon anything here.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Both of you stayed down there alone for that ten day period? A. Yes.

9868

Dorothy Isaacson—For Defts.—Cross

Q. During that ten day period, did Blanche discuss with you the alibi for September 12, 1936?

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. She did not.

9869

Q. She did not? A. No.

Q. You knew where Mendy Weiss was when you were down in Atlantic City with Blanche, didn't you?

Mr. Talley: That is objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

9870

Q. At no time during that ten day period was there any discussion with Blanche Weiss as to what occurred on September 12, 1936? A. No.

Q. When you came back from Atlantic City, madam, where did you go to live? A. Home.

Q. What was your home address? A. 148 Clinton Street.

Q. With whom did you live there? A. My husband.

Q. On the occasions when he was in jail, who lived with you at 148? A. I did not live at 148.

Q. Where did you live then? A. With my sister.

Q. Did you ever live with Blanche Weiss on

Dorothy Isaacson—For Defts.—Cross

9871

the occasions that your husband was in jail? A. No.

Q. How many times has he been in jail?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial. No matter how many times, it is no reflection upon this woman.

The Court: She can state. Of course it has a bearing. If he was a regular criminal during a lengthy married life and she stayed with him, it would have a bearing. Overruled.

9872

Mr. Talley: Exception.

A. I don't know.

Q. Don't you know how many times your husband has been in jail since you have been married?

Mr. Talley: Objected to as already answered.

The Court: Overruled.

Mr. Talley: Exception.

9873

By the Court:

Q. Since you have been married to him. Try to figure it out. A. About three times.

By Mr. Turkus:

Q. And were they long stays in jail?

Mr. Talley: Objected to as immaterial, irrelevant, incompetent.

9874

Dorothy Isaacson—For Defts.—Cross

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Did you know that your husband was a pickpocket when you continued to live with him after these jail terms?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

9875

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. And did you continue to live with him, knowing he was a convicted pickpocket?

Mr. Talley: I object, if your Honor pleases. Don't answer when I object, madam, please.

The Court: Overruled.

Mr. Talley: Exception.

9876

A. Yes.

Q. And did you live with him on the fruits of his criminal activities?

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: The jury can figure that out. Sustained.

Q. Did you live with him knowingly on the fruits of his criminal activities?

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9877

Mr. Talley: I object to that, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: That is a matter of deduction for the jury. Married eighteen years.

Mr. Turkus: Twenty-four I thought she said.

The Witness: No, I said I was married eighteen years.

The Court: And she knew he was a pickpocket and she continued to live with him.

9878

Mr. Talley: She has not said that. She said she knew he was sent to jail.

Mr. Turkus: She said she knew he was a convicted pickpocket and continued to live with him knowing it.

The Court: That is what she said.

Mr. Talley: She did not say it.

Mr. Turkus: Will you please be seated?

Mr. Talley: I object to that.

The Court: She said that, Judge. (To reporter) Read it.

Mr. Talley: I take an exception. I need not have it read back. I have your Honor's ruling.

9879

The Court: Never mind then.

By the Court:

Q. He supported you? A. Yes, your Honor.

By Mr. Turkus:

Q Did you associate with your husband's

9880

Dorothy Isaacson—For Defts.—Cross

associates during the eighteen years you have been married to him?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. And among those associates were there other pickpockets?

9881

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Calling for a conclusion.

A. No.

Mr. Talley: Exception.

Q. Were there any thieves among the associates of your husband that you have been going out with in the eighteen years of your marriage?

9882

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. No disreputable characters—

Mr. Talley: I object.

Q. Or exconvicts were in your party when you went out with your husband on any occasions?

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9883

Mr. Talley: Object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

A. Not that I know of.

Q. Did you know Unga, George Unga, at East 101st Street?

Mr. Talley: Objected to, if your Honor pleases, incompetent, irrelevant and immaterial.

9884

The Court: Overruled.

Mr. Talley: Exception.

A. Who?

Q. George Unga at 3 East 101st Street? A. I don't know.

Q. Does the name Horty Unga mean anything to you by way of refreshing your recollection?

A. Yes.

Q. Did you know Horty Unga? A. Yes.

Q. Did you go out with her? A. No.

Q. Where did you know her from?

9885

Mr. Talley: I object to it as immaterial, incompetent and irrelevant, no foundation having been laid for that.

The Court: Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. I met her through Blanche.

Q. Have you been up to the Unga house at 3 East 101st Street? A. No.

9886

Dorothy Isaacson—For Defts.—Cross

Q. Where did you meet this Horty Unga with Blanche?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't know. I don't remember where I met her.

9887

Q. Did you meet at the home of this woman Horty Unga? A. No.

Q. Can you recall where you met her? A. No.

Q. Did you associate with her after you made her acquaintance? A. No.

Q. Did you meet Yiddle Lorber and Al Engelson?

Mr. Talley: Object to it.

The Court: Overruled.

Mr. Talley: Exception.

A. I knew them, yes.

9888

Q. Where did you know them from? A. Brooklyn.

Q. Williamsburg in Brooklyn? A. Yes.

Q. Who introduced you to Yiddle Lorber and Al Engelson?

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception.

A. Nobody did. I just knew him.

Q. The meeting? A. I had met him. I met him through business.

Dorothy Isaacson—For Defts.—Cross

9889

Q. You met him through business? A. Yes.

Q. Yidale Lorber was a fixer, didn't you know?

Mr. Talley: I object to that, if your Honor pleases, vague, general, does not mean a thing as far as I can see.

The Court: We will see. Overruled.

Mr. Talley: Exception.

A. I met him as a bondsman.

Q. And Al Engelson, how did you meet him?

9890

Mr. Talley: Objected to on the same grounds.

The Court: Overruled.

Mr. Talley: Exception.

A. With—

Q. With Lorber? A. Yes.

Q. And go out socially with Lorber and Engelson? A. Never.

Q. Did you know Chick Weiss?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

9891

A. No.

Q. Outside of Mendy Weiss and Sidney Weiss, did you know any other Weiss of that family?

A. Yes.

Q. Who? A. Sammy Weiss, Murray Weiss.

Q. Yes. A. Solly.

Q. Solomon? A. Yes, and Maxie.

Q. Do you know whether any one of them is called "Chick"? A. No.

9892

Dorothy Isaacson—For Defts.—Cross

Q. What people other than Horthy Unga were you introduced to by the Weisses?

Mr. Talley: Object to that, incompetent, irrelevant and immaterial, too general; very remote from anything that I can see.

The Court: (To reporter) Will you read that?

(Pending question read.)

9893

The Court: Overruled.

Mr. Talley: Exception.

A. I cannot tell.

By the Court:

Q. Were there many? A. Yes.

Q. It was a long period you knew them? A. Yes.

Q. Did they introduce you to many people? A. Some.

9894

By Mr. Turkus:

Q. Madam, during the eighteen years that you have been married to your husband, have you knowingly associated with people who are exconvicts?

Mr. Talley: I object to that, if your Honor please, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't know what you mean by knowing that they were exconvicts.

Q. Yes, that is it exactly. Knowing that they were ex-convicts, did you associate with them?

A. With whom? Whom do you mean?

Q. Anybody who was an ex-convict, that you knew to be such did you knowingly associate with them when you were with your husband during these eighteen years? A. No.

Q. No ex-convicts at all?

Mr. Talley: It has been already answered, if your Honor pleases. I object to it.

9896

Q. Will you answer it, please?

Mr. Talley: I object to it.

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. During the eighteen years of your married life, have you knowingly associated with people who were violating the law?

9897

Mr. Talley: Objected to as already answered.

The Court: I think that is embraced more or less.

Mr. Turkus: An ex-convict is one who has violated in the past.

The Court: Sustained as to form.

Q. Did you knowingly associate with people

9898

Dorothy Isaacson—For Defts.—Cross

who were engaged in the commission of organized crime?

Mr. Talley: Same objection, if your Honor pleases, as to form; incompetent, irrelevant and immaterial; already been answered.

The Court: Overruled.

Mr. Talley: Exception.

9899

A. No.

Q. You were introduced to a man named Berger by Mendy and Blanche Weiss, weren't you? A. I don't remember.

Q. You don't remember? Do you know Paul Berger? A. No.

Q. Were you taken to the Gold Craft Clothes at 714 Broadway by Blanche Weiss? A. I don't remember.

Q. Didn't Blanche Weiss buy you clothes at the Gold Craft Clothes, 714 Broadway, Manhattan? A. She did not buy me clothes.

Q. What did she buy you?

9900

Mr. Talley: May we have the time?

A. We exchanged gifts but never clothes.

Q. Didn't she buy you a mannish suit or more than one at Gold Craft Clothes, 714 Broadway, Manhattan, operated by Paul Berger?

Mr. Talley: May we have the time fixed, if your Honor pleases?

Q. Any time.

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9901

Mr. Talley: Objected to.

A. No.

Q. What? A. No, she did not.

Q. Didn't you get Paul Berger to intercede for your own brother who had some difficulty in New Jersey?

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception.

9902

A. My brother never had any difficulty in New Jersey.

Q. Have you got a brother about fifty years old? A. No.

Q. How old is your brother? A. About 37.

Q. Is his hair turning grey? A. No.

Q. Did you have any trouble in Jersey a year and a half ago and did you get Paul Berger to try to help you out?

Mr. Talley: Objected to, if your Honor pleases, already answered; incompetent, irrelevant and immaterial.

9903

The Court: Overruled.

Mr. Talley: Exception.

A. No.

Q. Before you took this witness-stand, did anybody between recess yesterday and your appearance on the stand talk to you about your testimony? A. No.

Q. Did anybody tell you what they had testified to before you took the stand? A. No.

Q. Did you compare notes out in the hall or

9904

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any place else with any witness who had preceded you to the stand? A. No.

Q. Now we have it that down in Atlantic City, when you were there ten days with Blanche Weiss, nothing was said about September 12, 1936; is that right?

Mr. Talley: I object to the question and form of the question and upon the ground this has already been answered.

The Court: Overruled.

Mr. Talley: Exception.

9905

A. That is right.

Q. Between the time that you were down in Atlantic City with Blanche Weiss and the time you took the stand in court, who was the first person that spoke to you about the night of September 12, 1936? A. Sidney Weiss.

Q. And that conversation took place outside a candy store on the East Side? A. I don't know whether it was outside a candy store.

Q. It was not in your home? A. No.

9906

Q. When was it that Sidney Weiss spoke to you for the first time about September 12, 1936?

A. In the summer. During the summer.

Q. During the summer of 1941? A. Yes.

Q. In between the Atlantic City trip with Blanche Weiss and the summer of 1941, did anybody speak to you about the night of September 12, 1936? A. No.

Q. When Sidney Weiss came over to you in the summer of 1941, did he tell you that September 12, 1936, was his 26th birthday, that he had been in certain restaurants, the Brass Rail; that he had gone to a moving picture and then

Ratner's, and who was with him? A. No, he did not tell me.

Q. When Sidney Weiss spoke to you about September 12, 1936, and he mentioned that it was his birthday, you remembered, did you not, right then and there where you had been? A. No, not right then and there.

Q. How long did it take you to remember? A. It took me a little while.

Q. Well, what would you say; fifteen minutes? A. Maybe that or more.

Q. A half an hour? A. Yes.

9908

Q. During that half an hour, did Sidney Weiss prompt you as to occurrences?

Mr. Talley: I object to the form of the question, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Well, he asked me—

Q. Yes or no, madam, did he prompt you?

Mr. Talley: I ask the witness be allowed to answer the question without interruption.

9909

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Did he prompt you that it was his 26th birthday? A. He asked me whether it was.

Q. What was it that he prompted you with?

A. He did not prompt me with anything.

Q. You just said he did.

9910

Dorothy Isaacson—For Defts.—Cross

Mr. Talley: I did not understand her to say that, Mr. Turkus.

Mr. Turkus: It is funny you and I understand things so differently.

Mr. Cuff: Be fair with her.

Mr. Tarkus: Now we have Mr. Cuff.

Mr. Cuff: I know what is in her mind.

Mr. Turkus: If you had been fair with her you would not have put her on the stand.

9911

Q. Did you misunderstand the word "prompt", madam? A. No, I did not misunderstand but you made me answer to it "Yes."

Q. I made you answer "Yes"? A. I wanted to answer it my way and you would not let me.

Q. Well, was it that he did not prompt you? A. He didn't prompt me.

Q. Then the answer is "No" then; is that right? A. That is right.

Q. I cannot make you say "Yes" if you want to say "No", can I? A. I know we had spoken about it.

9912

Q. The question was, "did he prompt you?" and to that did I compel you to say, "Yes"? A. No.

Q. I gave you election between yes and no.

Mr. Talley: May we proceed with the examination?

Mr. Turkus: May we have an understanding with the witness? I want to be sure nobody is confused here, that I can compel her to answer questions "Yes" when they should be "No".

A. No, he did not prompt me.

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9913

Q. Who was the first one that suggested Sammy's place of business in this talk that you had with Sidney?

Mr. Talley: I object to that as being too indefinite, too vague, too uncertain. I ask that a time be fixed.

The Court: Overruled.

Mr. Talley: Also assumes that somebody suggested or made a suggestion; perfectly improper from a dozen different points of view. I take an exception to your Honor's ruling.

9914

A. I don't know what you mean.

The Court: By this time she has forgotten.

Q. (Pending question read.)

Mr. Talley: That is assuming that somebody did suggest it.

9915

A. I don't remember anybody suggesting it.

Q. Listen, madam. After a half an hour talk with Sidney Weiss, your memory was very clear about September 12, 1936; isn't that right? A. It was not very clear, but he did refresh my memory.

Q. Yes, it was very clear here on the witness stand, wasn't it? A. Yes.

Q. You have not any doubts about September 12, 1936, when you related your story to this jury under questioning by Mr. Talley? A. No.

9916

Dorothy Isaacson—For Defts.—Cross

Q. Now, how many times was your memory refreshed before you took the witness stand?

Mr. Talley: I object to that, if your Honor pleases. Improper in form.

The Court: Overruled.

Mr. Talley: Exception.

A. Well, I was up at Mr. Cuff's office once.

Q. Never mind Mr. Cuff's office.

9917

Mr. Talley: Let her answer.

Mr. Cuff: Ask the witness.

Q. Tell us all about Mr. Cuff's office. You went up there when? A. We went up there.

Q. Who is "we"? A. Sidney, Blanche, and I.

Q. Yes. How many times? A. Once.

Q. And the three of you spoke together? A. We spoke to—

Q. And you were interviewed by Mr. Cuff with the three of you being present? A. Yes.

9918

Q. How long after the incident of meeting Sidney on the East Side was that? A. About a month.

Q. And when was the next time you got together with anybody on your testimony? A. I think it was in September.

Q. September of this year? A. Yes.

Q. Where was this? A. In Judge Talley's office.

Q. Who was present then? A. Sidney, Blanche, Mrs. Weiss, and myself.

Q. You mean the elderly Mrs. Weiss? A. Yes.

Q. The mother of the defendant. And did the

four of you answer questions in each other's presence? A. Yes.

Q. And did the four of you talk about the occurrence of September 12, 1936, in each other's presence on that occasion? A. Yes.

Q. In all, how many times did you have discussions with the other witnesses in the case concerning the occurrences of September 12, 1936?

Mr. Talley: I object to the form of the question.

9920

The Court: Overruled.

Mr. Talley: Exception.

A. Just those three times.

Q. Between April, 1941, when you spent that ten days with Blanche Weiss in Atlantic City, until the time you took the stand, how many times were you in her house? A. I was not in her house at all.

Q. Never since April, 1941? A. No.

Q. Do you know where she lives now? A. Yes.

9921

Q. And you have never visited her there? A. She has visited me.

Q. At your home? A. Yes.

Q. How many times? A. Very often.

Q. And in all of these very often visits, how many times did you discuss the occurrences of September 12, 1936? A. Almost every time we would be together.

Q. Almost every time? What did you remember when Sidney Weiss first spoke to you on the East Side?

9922

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Mr. Talley: I object to the form of the question, if your Honor please.

The Court: About the birthday party?

Mr. Turkus: Yes, the occurrences of September 12, 1936.

The Court: Overruled.

Mr. Talley: Exception.

9923

A. He asked me whether I remembered being out with him and the others on his birthday, his 26th birthday, and after a while I did remember.

Q. There was something very significant about his 26th birthday, wasn't there? A. To me there was.

Q. To you there was. Where were you on your 26th birthday? A. I don't know.

Q. When he spoke to you about his 26th birthday, which to you had significance, what did you first remember about it? A. It was the only time I had ever been out in Sidney Weiss's company.

Q. Well— A. And celebrated a birthday.

Q. And what? A. And celebrated a birthday.

9924

Q. If that was the only occurrence, that you had been out celebrating a birthday, what was the significance of the birthday? A. His 26th birthday, that they told me it was his 26th birthday.

Q. And when he spoke to you then on the East Side, you remembered that? A. Yes.

Q. When he spoke to you on the East Side in 1941, you remembered that five years ago that was his 26th birthday that you attended? A. Yes.

Q. What else did you remember as he spoke to you on the East Side street there? A. Well, he asked me whether I remembered spending that

night with him, his birthday, and I said I did, and then we went along and we kept talking about what we did that night, and then—

Q. Not so fast now. Now, when you say, "We kept on talking," who did the talking? A. Sidney and I. We both.

Q. Back and forth? A. Yes.

Q. Each one refreshing the other as to a detail? A. Maybe so.

Q. Not "maybe so," what happened, madam? A. Well, he asked me whether I remembered going out that night.

Q. Yes, and you said you remembered it? A. I said I did.

Q. All right. After you remembered that, what was the next thing he asked you? A. Then he told me that sometime later he would take me up to Mr. Cuff's office.

Q. When you said that you remembered going out with him that night, he said he would take you up to Mr. Cuff's office? A. Yes.

Q. Did he ask you if you remembered going down to Sammy's place of business? A. I don't remember whether he asked me.

Q. Look, madam, you are remembering back to 1936. Let us see if you cannot remember back to that little meeting on the East Side.

Mr. Talley: I object.

Q. In 1941.

Mr. Talley: I object to the statement of the District Attorney, the form of the question, if it is intended to be a question.

9928

Dorothy Isaacson—For Defts.—Cross

Mr. Turkus: Objection before I had the question.

The Court: What is the question?

Mr. Turkus: (to reporter) Read the one before the objection.

(Question read.)

Mr. Talley: That statement is objected to. It is not a question.

Mr. Turkus: I will never get a question finished with this machine-gun fire of objections, if they come in between the time I start and finish the question.

9929

Mr. Talley: If you asked proper questions—

Mr. Turkus: Gives the witness an awful long time to ponder.

Mr. Talley: May I have a ruling to stop this torrent? Rule one way or the other, but rule, please.

The Court: I have been trying to find a chance. Overruled.

Mr. Talley: Exception.

9930

Q. Now think. Did Sidney tell you anything about Sammy's automobile place of business in 1941, in the summer, when you were on that East Side street talking it over? A. I can't remember.

Q. In the summer of—

The Court: Please interrupt me if anybody objects to this:

By the Court:

Q. Was there anything particular about 26 that made you remember it as being different

Dorothy Isaacson—For Defts.—Cross

9931

from 25 or 27? A. Your Honor, he said it was his 26th—

The Court: Yes or no.

Mr. Talley: I object to the question, if your Honor pleases. It does not demand a yes or no answer.

The Court: I withdraw the question.

Mr. Talley: Thank you.

Mr. Turkus: What was the answer that you gave before the objection was interposed?

9932

The Court: I meant, how did it happen to register it was 26 all these years.

Mr. Talley: She has endeavored to tell and has been prevented.

Mr. Turkus: That is an improper statement.

By Mr. Turkus:

Q. Let us get back to the summer of '41 in this East Side street where you are talking with Sidney. Did Sidney speak of who drove the automobile that night? A. I don't remember.

9933

Q. Did he mention his brother's name, Mendy Weiss, as being in the party that night—yes or no? A. I can't remember.

Q. Did he mention the Brass Rail Restaurant on 7th Avenue and 49th Street or 50th Street in Manhattan? Yes or no? A. I don't remember.

Q. Did he mention the Capitol Theatre movies on that little East Side street in the summer of 1941? A. I don't remember.

9934

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Q. And did he mention the automobile ride through the park? A. I don't remember.

Q. Did he mention the automobile ride to Ratner's Restaurant on the East Side of Manhattan? A. I can't remember those things.

Q. You can't remember those things? Those things took place in the summer of 1941. Am I correct? A. That is right.

9935

Q. Let us come a little closer to the time that you took the witness stand. Who was the first person, if anyone, who mentioned about the Brass Rail Restaurant? A. I don't remember that.

Q. Was it you? A. Might have been.

Q. Not what it might have been. We are not here to speculate. A. I don't remember, then.

By the Court:

Q. Do you remember this: Did you eat a light snack or did you eat a big meal then? A. I don't remember.

9936

Q. When you got to Ratner's, did you eat a light snack or a big meal? A. I had coffee. It was late.

Q. You were there an hour? A. Yes.

Q. Just coffee? A. And cake.

Q. Just a light bite? A. Yes.

Q. Before going to the East Broadway place and from there to the Brass Rail, did you have your regular dinner at home? A. No, I had had a light bite up at Blanche's house in the afternoon.

Q. What time in the afternoon? A. About 5:30 or 6 o'clock.

Q. 5:30 a light bite. You don't remember

Dorothy Isaacson—For Defts.—Cross

9937

whether at 10 o'clock at the Brass Rail or 11 o'clock you had a full meal or a light snack?

A. I don't.

Q. But you do remember that three hours later, at Ratner's, it was just a bite? A. Yes.

The Court: All right.

By Mr. Turkus:

Q. Who was the first person, if you can remember, who spoke of Mendy Weiss being in the party of September 12, 1936? A. I don't remember.

9938

By the Court:

Q. At that time did the Brass Rail have a front on it or was it wide open to the street? A. I don't remember, your Honor.

Q. Have you been there on any other occasion? A. Yes.

Q. How many times? A. A number of times.

Q. About how many times? A. I don't know just how many times.

9939

Q. Many? A. Yes.

By Mr. Turkus:

Q. Where in the Brass Rail was it that you sat? A. I don't remember where I sat.

Q. Downstairs, upstairs, what floor? A. I can't remember where I sat. I don't know.

Q. This birthday party of September 12, 1936, don't you remember what floor you were on? A. No.

9940

Dorothy Isaacson--For Defts.--Cross

By the Court:

Q. You know there is a great big bar there on the ground floor? A. Yes.

Q. You know that, a very big bar? A. Yes.

Q. Have you any recollection at all as to where you sat? A. No.

By Mr. Turkus:

9941

Q. Was there a birthday cake, madam, at the table? A. No.

Q. No birthday cake.

By the Court:

Q. Were there any candles to count so as to fix that 26 in your mind all these years? A. No, our Honor.

Q. Yes or no? A. No.

By Mr. Turkus:

9942

Q. Who was the first person, if you can remember, who spoke about eating in Ratner's restaurant? A. I don't remember.

Q. But these all happened since the summer of 1941, these talks? A. I don't remember who spoke about it first.

Q. It was not you? A. I don't remember who it was.

Q. You do not even know whether it was yourself who first suggested it? A. No, I don't.

Q. Was there anything outstanding about the Brass Rail in September 12, 1936?

Mr. Talley: I object to that as being too indefinite, too vague, uncertain. I do not know what counsel means by "out-standing". I ask the question be made more plain.

By the Court:

Q. Anything in particular you remember?

The Court: I suppose that is what you mean?

9944

Mr. Turkus: That is it.

A. No.

Q. Was there any discussion or anything in particular that makes 26 the outstanding number that lodges in your mind? A. No.

Q. Did it make any difference to you whether it was his 25th or his 26th birthday? A. It did not make any difference, with the exception that they told me it was his 26th birthday.

Q. For some reason that lodged in your mind?

A. The only reason is because that was the only time I had ever been out with Sidney Weiss.

9945

Q. Speak loud. The jury cannot hear you.

A. That was the only time I had ever been in Sidney Weiss's company, was his 26th birthday.

Q. So 26 stuck in your mind? A. Yes.

Q. I am asking you that because, according to the birth certificate, his Saturday birthday was his 25th birthday, the year before.

Mr. Talley: Will your Honor let us hear your question?

9946

Dorothy Isaacson—For Defts.—Cross

Mr. Climenko: I do not understand the question.

Mr. Talley: I do not get your Honor's question at all. He was 26 years old on—

The Court: Sunday, not Saturday.

Mr. Talley: They were celebrating from Saturday into Sunday, his birthday.

Q. Did you understand that Saturday was not his birthday, but the day before his birthday?

9947

A. Yes.

By Mr. Turkus:

Q. When did you understand that? A. They had told me that that night.

Q. Did you remember that since 1936? A. After Sidney refreshed my memory I did.

Q. I see. Now, after having your memory refreshed, you remembered that on Sidney's 26th birthday you went to Sammy's place of business, is that right? A. Yes.

Q. That is clear? A. Yes.

9948

Q. And that you met there Mrs. Weiss, Blanche Weiss, Sidney Weiss, and Mendy Weiss? A. No.

Q. That is not clear? What is clear about the meeting in the place of business? A. At Sammy's place?

Q. Yes. A. Blanche, Mendy, and myself drove down there.

Q. Yes, the three of you. A. And it was there that we picked up Mrs. Weiss and Sidney.

Q. Under what name was Blanche Weiss and Mendy Weiss living at the time in 1936?

Dorothy Isaacson—For Defts.—Cross

9949

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Weiss.

Q. Where were they living then? A. 301 East 21st Street.

Q. What borough? A. Manhattan.

Q. You remember after refreshment that you drove down to that place? A. Yes.

Q. You remember every occurrence that took place from that time on, don't you? A. From that night on.

9950

Q. What? A. That particular.

Q. From that time on. You know what time it was that you met there, isn't that right? A. Yes.

Q. What time was it? A. It was 10 o'clock we had the appointment for.

Q. And you knew you got there at ten o'clock? You remembered that? A. If we had the appointment for that time I suppose we got there.

9951

Q. Do you remember that you got there at 10 o'clock? A. I could not say I remembered. I knew we were supposed to meet him at 10 o'clock and we drove down to meet him.

Q. When you testified on direct examination, when Mr. Talley asked you questions, you remembered that it was about 10 o'clock that you got there. A. I said "about."

Q. And it was about 11 when you got to the Brass Rail? A. Yes.

9952

Dorothy Isaacson—For Defts.—Cross

Q. And that it was about 12 when you left the Brass Rail? A. Yes.

Q. And that it was shortly after 12 that you got to the Capitol Theatre? A. Yes.

Q. And that it was about 2 o'clock in the morning when you got out of the Capitol? A. That's right.

Q. And that there was a ride in Central Park down to Ratner's Restaurant? A. Yes.

9953

Q. And that you got in Ratner's Restaurant about 3 o'clock? A. Yes.

Q. And that you left Ratner's Restaurant about 4 o'clock? A. Yes.

Q. Those are all things you remember? A. Yes.

Q. You could even remember the picture that was playing, couldn't you? A. No, I don't.

Q. Now think. Think hard and see if you cannot even remember the picture that was being played. A. No.

Q. See if I can refresh your recollection. Wasn't it "The Gorgeous Hussy"? A. Yes, it was.

9954

Q. And the man who played the lead was who, in "The Gorgeous Hussy"? A. Robert Taylor.

Q. And the lady star who played the co-lead was who? A. Joan Crawford.

Q. When I said the name "Gorgeous Hussy" to you, you remembered both stars who played in it? A. Yes.

Q. And you remembered that all the way back to September 12, 1936; is that right? A. Yes.

Q. So, by the way, you can even remember what that picture was about, can't you? A. No, I don't.

Mr. Turkus: That is all, sir.

By the Court:

Q. Can you remember anything about the play itself? A. The picture?

Mr. Turkus: Your Honor, I omitted certain questions. I have been reminded that I have not covered them. I will be very brief with this, and I think I will finish by four o'clock.

By Mr. Turkus:

9956

Q. Mrs. Isaacson, you are indebted to Mendy Weiss and Blanche Weiss, aren't you?

Mr. Talley: I object.

A. No, I am not.

Q. I don't mean financially.

The Court: Overruled.

Q. You are indebted to them for having been permitted to sleep in their home and being fed by them and being clothed by them at times when your husband was in jail; is that correct?

9957

Mr. Talley: I object to the form of the question.

The Court: You mean whether she feels under—

Mr. Turkus: Yes, feels under an obligation.

The Court: I think the question as to whether there is an obligation she may

9958

Dorothy Isaacson—For Defts.—Redirect

have an impulse to repay is one for the jury, not for the witness. Judge Talley's objection is sustained.

Q. Let me just ask you this question: Mrs. Isaacson, wasn't this alibi cooked up in 1936 with you a party to it, way back five years ago? A. No.

9959

Mr. Talley: Object to the form of the question, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Mr. Turkus: I am through.

Mr. Talley: I have no further questions.

The Court: Just one thing.

By the Court:

Q. Think very hard. Have you the slightest recollection of what that play was about? A. I can't remember.

9960

Q. You can always read up a title and those who played the leading parts. A. Yes.

Q. But can you remember anything about what the picture was about which you saw? A. I think it had a lot to do with the Civil War itself and the time of the Civil War, if I remember correctly.

Redirect examination by Mr. Talley:

Q. Mrs. Isaacson, who is your favorite movie actress? A. Joan Crawford.

Q. Was it you who suggested going to see

Dorothy Isaacson—For Defts.—Recross

9961

Joan Crawford in that picture that night? A.
Yes.

Mr. Talley: I have no further questions.

Recross-examination by Mr. Turkus:

Q. Robert Taylor your favorite male lead? A.
No.

Mr. Turkus: That is all.

The Court: We will recess until 10
o'clock on Monday morning. Everybody
remain seated until the jury passes out.

9962

Gentlemen, please remember all previous
admonitions. They are continuous through-
out the trial. Do not discuss the case, let
nobody talk to you about it. Keep your
minds open. Read nothing about it. Don't
listen to the radio about it.

The defendants are remanded.

(Adjournment taken to Monday, Nov. 24,
1941, at 10 a. m.)

9963

9964

Blanche Weiss—For Defts.—Direct

Brooklyn, N. Y., November 24, 1941.

TRIAL RESUMED

BLANCHE WEISS, residing at No. 10 Monroe Street, in the Borough of Manhattan, City and State of New York, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

9965

Direct examination by Mr. Talley:

Q. Will you tell us where you are now living?

A. Yes, sir.

Q. Where is it? A. No. 10 Monroe Street.

Q. In the Borough of Manhattan? A. Yes, sir.

Q. And in the City of New York? A. Yes, sir.

Q. Are you the wife of Emanuel Weiss, the defendant? A. Yes, sir.

Q. How long have you been married to him?

A. Eight years.

9966

Q. Do you remember the night of September 12, 1936? A. I do.

Q. Did you go anywhere from your place of residence with your husband that night? A. I did.

Q. Where did you go? A. I went over to my brother-in-law Sammy's store.

Q. Who was with you? A. My husband and Dotty.

Q. Dotty Isaacson? A. Yes, sir.

Q. Do you know at what time you got to Sammy's store? A. Well, I believe it was 10

o'clock, because we had a 10 o'clock appointment.

Q. You mean an appointment to be there at ten o'clock? A. Yes, sir.

Q. With whom was the appointment made? A. My husband had told me about this appointment. He said my mother-in-law and my brother-in-law Sidney would be at the store; that we were to meet them at 10 o'clock.

Q. At 10 o'clock? A. Yes, sir.

Q. Where were you living at that time? A. 301 East 21st Street.

9968

Q. In the Borough of Manhattan? A. Yes, sir.

Q. Did you go from there to Sammy's store? A. Yes, sir.

Q. And where was that? A. That was on East Broadway, right off—

Q. Did you go in an automobile? A. Yes, sir.

Q. Who went with you, your husband and Dotty? A. Yes, sir.

Q. And you got to Sammy's place of business at about 10 o'clock that night? A. Yes, sir.

9969

Q. Did you get out of the car? A. No, sir.

Q. Did you and Dotty remain in the car? A. That is right.

Q. Did Mendy get out of the car? A. He did.

Q. What did you see him do? A. I saw him walk into the store and talk to my mother-in-law and Sidney, and Sammy.

Q. Then did they come out? A. Well, Sammy came over to the car first.

Q. And spoke to you? A. Yes, sir, saying, "Hello," and "How are you?"

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Q. Then, did Mendy and his mother and Sidney get into the car? A. That is right.

Q. Did you then drive away? A. That is right.

Q. Who drove the car? A. Mendy did.

Q. Where did you drive? A. We drove up-town to a restaurant.

Q. Do you remember what restaurant it was? A. Yes, sir, it was the Brass Rail.

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Q. Do you remember where it was? A. On 7th Avenue and 49th Street.

Q. What did you do when you got to the Brass Rail, did you wait outside? A. Yes, sir, we waited outside and my husband went to park the car.

Q. Then did he come back? A. Yes, sir.

Q. Walking? A. Yes, sir.

Q. Then did you go into the restaurant? A. We all went into the restaurant.

Q. Who was in the party that went into the Brass Rail Restaurant? A. Well, there was Dotty there, my mother-in-law, Sidney, my brother-in-law, and my husband and myself.

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Q. What time do you say it was when you got into the Brass Rail? A. Well, I could not say exactly. I believe it was before 11 o'clock.

Q. What is your best recollection? A. I would say around 11 o'clock.

Q. Then you remained there for how long a time? A. Well, I don't know just how long, but I know we got out in time to make the midnight picture.

Q. Did you have something to eat and drink in the Brass Rail? A. The only thing I can remember is we did have a few drinks.

Q. I don't want to know what you had. Did

you have something to eat or drink, or both?

A. Yes, sir.

Q. Then you went to a show at 12 o'clock? A. Yes, sir.

Q. What theatre did you go to? A. We went to the Capitol Theatre.

Q. Did you ride from the Brass Rail or walk, to the Capitol? A. No, we walked there.

Q. And the Capitol Theatre was where? A. 50th and Broadway, or 51st, I don't remember which.

Q. Did you go in to see a picture there? A. Yes, sir.

Q. Did you remain until the picture was finished? A. Yes, sir.

Q. Do you remember what the picture was? A. No, I don't.

Q. What time was it when you came out of that theatre? A. I should say it was about 2 or—

Q. Was Mendy with you? A. Yes, sir.

Q. And the other Mrs. Weiss? A. Yes, sir.

Q. And Sidney? A. Yes, sir.

Q. And Dotty? A. Yes, sir.

Q. The same party that was in the Brass Rail was in the Capitol picture place? A. That is right.

Q. And came out together? A. That is right.

Q. You say that was about 2 o'clock in the morning? A. I think it was around that.

Q. What did you do then? A. We then proceeded to take a drive through the park.

Q. Was it a warm night? A. I believe it was.

Q. When you say you believe, that doesn't mean anything. Do you recollect whether it was

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or was not? It was a clear night, anyhow? A. Yes, sir, it was a clear night.

Q. Did you take the drive through the Park? A. Yes, sir.

Q. Where did you go then? A. After we got through going through the Park we started for downtown.

Q. Did you go downtown? A. Yes, sir.

Q. Where did you go? A. We went into a restaurant on Delancey Street.

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Q. Is that Ratner's Restaurant? A. Yes, sir.

Q. The same party was with you? A. Yes, sir.

Q. Mendy was with you, and your mother-in-law, and Dotty and Sidney? A. Yes, sir, that is right.

Q. Do you know what time it was when you got into the restaurant, Ratner's Restaurant? A. Well, around three o'clock.

Q. You remained there how long? A. About one hour.

Q. Did you have some food or refreshment there? A. Yes, sir.

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Q. What time would that make it, when you left Ratner's Restaurant? A. I would say around about 4 o'clock.

Q. Did you leave together? A. Yes, sir.

Q. Was Mendy still driving the car? A. Yes, sir.

Q. Where did you go? A. We went to take my mother-in-law and Sidney home.

Q. Did you take them home? A. Yes, sir.

Q. And deposit them at their door? A. Yes, sir.

Q. And then where did you and Dotty and Mendy go? A. We went to my apartment.

Q. Where was it then, 21st Street? A. Yes, sir.

Q. East 21st Street? A. Yes, sir, East 21st Street.

Q. That is in Manhattan? A. Yes, sir.

Q. Did Dotty go with you? A. Yes, sir.

Q. And Mendy? A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. What time was it do you say when you got to your apartment on 21st Street? A. It was sometime after 4 o'clock.

Q. What did you do when you got to your apartment? A. When we got to the apartment we started in to get ready for bed and spoke for a while.

Q. What do you mean, you sat down and chatted for a while? A. Yes, sir.

Q. Then you got ready to go to bed? A. Yes, sir.

Q. Did you go to bed? A. Yes, sir.

Q. Where was Dotty sleeping? A. She was sleeping in the living room.

Q. Where were you sleeping? A. I was in the bedroom.

Q. Was Mendy there likewise? A. Yes, sir.

Q. Did you have a single bed or one double bed? A. We had one bed.

Q. Did you and Mendy sleep in that room? A. Yes, sir.

Q. That morning? A. Yes, sir.

Q. You got to bed about what time, you say? A. I should say it was near 5 o'clock. I would not be sure of the time; I would say it was around 5 o'clock.

Q. Dotty was sleeping on a couch in the living room? A. Yes, sir.

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Q. At what time did you get up? A. I got up about 12 o'clock.

Q. 12 o'clock noon on Sunday, September 13th?

A. Yes, sir.

Q. When you woke up was Mendy there? A. Yes, sir.

Q. Was Dotty there? A. Yes, sir.

Q. What did you do when you got up? A. I went into my kitchenette and started to prepare breakfast.

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Q. Did you? A. Yes, sir. I then asked Mendy whether he was ready to eat.

Q. Did he get up out of bed? A. Yes, sir.

Q. Was he undressed? A. Yes, sir.

Q. Did he have his breakfast? A. Yes, sir.

Q. Did Dotty have breakfast with you also?

A. Yes, sir.

Q. How long were you engaged in breakfast?

A. I would say over one hour.

Q. Where did you go, if any place, after that?

A. Sometime in the afternoon we got dressed and we went down—we drove to see my sick father.

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Q. Where was he? A. Out in Brooklyn.

Q. Was Dotty still with you or did you leave her home? A. No, we dropped her off at her home.

Q. Where was that? A. On Henry Street.

Q. Was that on Henry Street, Manhattan? A. Yes, sir.

Q. Was that on your way to your father's place in Brooklyn? A. Well, it was maybe a few blocks out of the way.

Q. You left your house to go to Brooklyn? A. Yes, sir.

Q. And instead of going directly there, you

dropped Dotty off on your way; that is what I mean. A. Yes, sir.

Q. When you were en route, on the way to Brooklyn, you dropped her off at her house? A. Yes, sir.

Q. And you got to your father's house when? A. Sometime late in the afternoon.

Q. Where was that? Where was your father's house? A. In Brooklyn.

Q. Was it your custom to visit him every Sunday? A. Yes, sir, we go there every Sunday.

Cross-examination by Mr. Turkus:

Q. You were picked out of the court-room here and identified by a narcotic agent as Rose Bell? A. Yes, sir.

Q. You have been sitting through this trial for weeks? A. Yes, sir.

Q. You sat through the testimony of every alibi witness that took the stand?

Mr. Talley: I object to the form of the question. And I think the District Attorney should now state that Mrs. Weiss was sitting here during the latter part of this trial with his consent, and at the direction of the Court—and with the permission of the Court, and at my request. I do not want any innuendo conveyed as to her being present at the trial.

Mr. Turkus: There is no innuendo.

The Court: There is no innuendo. The Court authorized it because she was simply an alibi witness. That was about two weeks ago.

Mr. Talley: Yes.

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Mr. Turkus: And at the request of Mr. Talley.

Mr. Talley: Yes.

Mr. Turkus: There is no innuendo about it except the jury is entitled to know she heard the testimony of every alibi witness that preceded her on the stand.

Mr. Talley: Certainly, she was here with your knowledge and with the permission of the Court, but at my request.

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Mr. Turkus: Why is there objection to the question?

Mr. Talley: Because there is a suggestion there that she was in this court-room solely for the purpose of hearing other witnesses in this case. You know what the suggestion is.

Mr. Turkus: Having made your explanation to the jury, is there any objection to the question?

Mr. Talley: Yes, I object to the question as incompetent, immaterial and irrelevant.

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The Court: Objection overruled.

Mr. Talley: I wanted the jury to know what the facts were. I except.

The Court: If I recall correctly, this is what happened: I thought it better, at Judge Talley's request, to have the wife of the defendant present during the trial instead of kept in the corridor. It would be inhumane and unreasonable to keep her out in the corridor simply because she would be an alibi witness. While Mr. Turkus opposed it, the Court prevailed

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upon Mr. Turkus to overcome his objection, and the Court directed she be permitted to sit here during the trial, as the wife of any defendant should be permitted to do. Proceed.

Q. You sat here during the testimony of every alibi witness who took the stand? A. Yes, sir.

Q. What is your maiden name? A. Blanche Langsam.

Q. You have a married sister? A. Yes, sir.

Q. What is her name?

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Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I have three married sisters.

Q. Have you one, Simon? A. Yes, sir.

Q. What is her name? A. Rose Simon.

Q. Where does she live? A. 147 West 79th Street.

Q. That is in Manhattan? A. Yes, sir.

Q. When, in the month of April, did you spend two weeks with Rose Simon—April, 1940?

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Mr. Talley: Objected to as incompetent, immaterial and irrelevant; not proper cross-examination. If this line of questioning is to be continued, it can only be by the District Attorney making this lady his own witness.

The Court: Objection overruled.

Mr. Talley: Exception.

A. In April, 1940?

9994

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Q. Yes. A. I do not remember.

Q. Let me see if I can refresh your recollection. Did Mendy tell you that he was to the District Attorney's office on March 28, 1940, and questioned, in Brooklyn?

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Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and upon the further ground to which I direct your Honor's particular attention—I might as well do it now as at any other time in the case. I object to the question on the further ground it is an attempt on the part of the District Attorney to compel this witness to testify against her husband, in violation of the law of this State. I direct your Honor's attention to the provisions of the Penal Law, Section 2445, which says: "The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage." Section 349 of the C.P.A., which is analogous, provides, in part, as follows, and I quote: "A husband or wife shall not be compelled or without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage." And the leading case on that subject is *People against Wood*, 126 N. Y., which holds that, "no confidential communication between

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husband and wife may be disclosed by one spouse if objected to by the other."

As attorney for the defendant Weiss, I put upon the record the objection. I now object to this witness testifying to anything arising out of the matrimonial state. May I call your Honor's attention to the analogy between these two sections of the Code, showing the intent of the law in this case. Section 347 of the Civil Practice Act, which provides: "A person interested in the event shall not be examined as a witness in his own behalf, or interest—" The language is as follows: "Concerning a personal transaction or communication between a witness and the deceased person, except where the executor or administrator is examined in his own behalf." That is a section of the law which is generally invoked where, as your Honor will recall, a claim is made against the estate of a deceased person and the person making the claim is not permitted to testify. It most frequently arises in the Surrogate's Court. A person making a claim is not permitted to state any conversation or transaction he has had with the deceased person. And the Court of Appeals, in passing upon that section, in *Griswold v. Hart*, at 205 N. Y., page 384, defines this as a transaction which is prohibited. "Whatever he (the witness) derives from the personal presence of the deceased by the use of his senses is a communication from the

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deceased to him within the meaning of the statute."

I submit that is the law applicable here in this State and to this examination; that this witness cannot be compelled to testify to any transaction or any communication—or anything she saw or heard—anything that she acquired knowledge of by the use of her senses—she cannot be compelled to testify in this case against the defendant Weiss. That is the law.

10001

Mr. Turkus: The law can hardly be so ridiculous that a woman can testify to an alibi and then avoid cross-examination.

Mr. Talley: That is my objection, bearing in mind this District Attorney is now making this witness his own witness once he departs from cross-examination on the alibi and brings out anything not disclosed by the direct examination, he makes her his own witness.

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The Court: Cross-examination, particularly on collateral impeachment is largely composed of blank cartridge shooting. There may be no damage done by all this sort of shooting, but anything that hits the mark is one of the difficulties the Court has to face in taking notes of cross-examination. Of course, on the direct, everything is known in advance and everything is solid meat. At first the Court was under the impression that this was purely in the nature of a collateral impeachment, but the Court senses that what it is really in the nature of doing is to

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specify an intent to show that Weiss' flight in the month of May, in or about, or later on, was because of the Rosen case and not because of the Dewey investigation, and not because of any Federal matter. So far on the record all we have is the testimony—we have the testimony of Paul Berger—

Mr. Turkus: The Tannenbaum incident.

The Court: —that in May, 1940, he read in the newspaper something about Tannenbaum and then he had a talk with Weiss about it the next day, and Weiss said, "It looks like Allie is talking and I will have to take a duck," which is something if the jury believes it and it is connected up to the jury's satisfaction, as a motive for alleged flight. Then flight may be considered on the question of guilt under a proper charge on that point of law by the Judge.

10004

Now, it impresses me that this is an attempt to obtain from this witness testimony that her husband made some sort of admission to her, and for that reason I think it is improper and the objection is sustained.

10005

Mr. Turkus: I will revise the question.

By Mr. Turkus:

Q. Do not answer this until the Judge rules on the objection. Did Mendy, in the presence

10006

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of others, tell you that he had been in the District Attorney's office on March 28, 1940?

Mr. Talley: I make the same objection on the same grounds stated to the last question.

The Court: "In the presence of others", takes it out of the class of confidential communication.

10007

Mr. Talley: I submit it does not, with great respect.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. I will revise it. Did Mendy, in the presence and hearing of any other person besides yourself, tell you he had been in the District Attorney's office March 28, 1940? A. I don't remember.

10008

Q. Don't you remember whether your husband told you, in the presence of someone else, and in the hearing of someone else, he had been questioned in the Brooklyn District Attorney's office?

Mr. Talley: I object to the form of the question. The question, "Don't you remember", assumes something happened that might be remembered. It is a question which should not be permitted in that form.

The Court: You might specify who the others are; maybe then she would remember.

Mr. Turkus: I withdraw the question. There has been objection to it.

Q. Where were you living in April, 1940? A. In 12th Avenue and 46th Street.

Q. What address? A. I think it was 2045, I am not sure.

Q. Had you been living there in March, 1940? A. Yes, sir.

Q. Under what name?

Mr. Talley: I object, if your Honor pleases, again on the ground that this witness cannot be compelled to testify against her husband under this section of the law I have quoted.

10010

Mr. Turkus: This goes to her credibility.

Mr. Talley: It cannot possibly affect her credibility. It cannot be adduced in evidence properly in any court.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Under what name? A. The name of Newman.

Q. Had you lived any other place before that under a fictitious name?

10011

Mr. Talley? Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Where was the place you lived, or the places you lived under a fictitious name or names? A. At 230 Park Place.

Q. That was Hoffman? A. Yes, sir.

Q. What other places?

10012

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Mr. Talley: I make the same objection, if your Honor please, upon the same grounds.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Just those two.

Q. Did you ever live under the name of Klein?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10013

A. No, sir.

Q. When did you live in 230 Park Place under the name of Hoffman?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I think it was in 1938.

Q. You lived there a year? A. I lived there more than a year.

10014

Q. For how long? A. About 18 months, it might have been 1937.

Q. Did you break the lease in moving out?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and upon the same ground urged to the other questions.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Out of 230 Park Place?

Q. Yes. A. I don't know whether you would call it breaking a lease. They told me to move because of my husband being arrested in that building.

Q. You had a lot of visitors there, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, on the same grounds urged before.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know what you mean when you say "visitors".

Q. Others than the members of your family, for example, wasn't Charley "Bugs" Workman a visitor there? A. No, sir.

Q. Wasn't Allie Tannenbaum a visitor there? A. No, sir. They were not.

Q. When did you move out of the 12th Avenue address in Manhattan that you say you lived in in April of 1940 under the name of Newman? A. In April.

Q. Were you present when the furniture went out? A. No, sir.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. What date in April did the furniture go out?

Mr. Talley: Same objection.

The Court: Objection overruled.

10018

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Mr. Talley: Exception.

A. I don't remember.

Q. Who made the arrangements for taking the furniture out? A. My husband.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10019

Q. Where was the furniture taken to?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

Mr. Turkus: May I suggest at this point that Judge Talley have a continual objection instead of having to interpose an objection to each question? There is an objection to every question, which seriously breaks up the cross-examination. If it can be done, I would like him to do it.

10020

The Court: That is the right of counsel.

A. It was taken to a storage house.

Q. What storage? A. I think it was the Regal.

Q. It is still there? A. Yes, sir.

Q. Now, having that background, is your memory refreshed about living with your sister in the 79th Street house of Rose Simons, for about two weeks?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir, I don't remember.

Q. Don't you remember this occasion, that while Rose Simons was at work—and does she work, by the way? A. Yes.

Q. Where does she work?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant, a sister of this witness, trying to bring her into the case.

10022

The Court: Let us find out. Objection overruled.

Mr. Talley: Can't you see the harm and injustice that might be done?

The Court: I don't see any harm.

Mr. Talley: I object to the form of the question because of the implication in the part that says, "Don't you remember," assuming something happened that was to be remembered. Let the witness testify, if your Honor compels her to, as to the fact.

10023

Mr. Turkus: I wish you would let her testify.

Mr. Talley: Stop until I finish. —and not to be asked about remembering something that may not have happened at all, that nobody could remember.

The Court: Take your exception.

Mr. Talley: I except.

Q. Where did she work? A. I don't know the address.

10024

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Q. It is a millinery business? A. No, sir.

Q. What kind of a business? A. Dress business.

Q. Is it not a fact that while Rose Simons was away at work Mendy came and took you away?

Mr. Talley: I object. This witness cannot be compelled to testify against her husband, because of the marital rule. It is incompetent, immaterial and irrelevant also.

10025

The Court: Reframe the question. Leave out the word "took", and see whether she went away.

Q. Is it not a fact that one day during the month of April, 1940, while Rose Simons was away at business, that Mendy came to the apartment and you and Mendy departed therefrom?

Mr. Talley: I make an objection on the same grounds as heretofore stated.

The Court: Overruled.

10026

Mr. Talley: Exception.

A. I don't know what you mean by that.

Q. You don't understand me? A. I don't understand you to that effect.

Q. Don't make speeches, madam, if you don't understand.

Mr. Talley: May I ask your Honor, in behalf of the witness, if your Honor requires her to answer, may I ask the District Attorney to restrain his zeal to the

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extent of allowing this lady to finish her answer?

The Witness: I don't remember being there.

Q. You don't remember being in Rose Simons' apartment at any time during the month of April, 1940? A. I know I was there, but just when I was there—I have been there so many times that I cannot recall the month or anything.

Q. Let us see, you testified in Mr. Talley's examination as to something that allegedly occurred in September, 1936. I am bringing you up to 1940, in April, less than two years ago. Don't you remember an occasion when your husband came to Rose Simons' apartment while she was away at business and that the both of you departed from the Simons' apartment? Don't you remember that?

10028

Mr. Talley: I object to the form of the question, primarily because of the use of the words, "Don't you remember." There has been no evidence to indicate that what the District Attorney is referring to ever happened outside of his imagination or misinformation. The witness should not be required or asked to answer a question of that kind.

10029

The Court: Objection overruled.

Mr. Talley: Exception.

A. I do not remember that occasion.

Q. Do you deny it happened?

Mr. Talley: I object to the form of the question.

10030

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The Court: Objection overruled.

Mr. Talley: Exception.

A. I do not deny because I do not remember.

Q. Now, does this refresh your recollection?
Do you know the Ungers? A. Yes, sir.

Q. What is his first name? A. George Unger.

Q. Was his wife's name Horty? A. Yes, sir.

Q. You were in court when you heard the
other witness testify about the Ungers, weren't
you? A. Yes, sir.

10031

Q. How long have you known George Unger?

A. Say about 10 years.

Q. How long have you known his wife Horty?

A. His wife Horty I have known since their
marriage.Q. How long is that? Well, five years, two
years, one year? A. I think about five or six
years.Q. Are you friendly with the Ungers? A.
Yes.Q. Have you been in the society of George
Unger, and his company, on various occasions?

10032

A. I don't know what you mean when you say
"company"?Q. Have you been out with your husband
when Unger was out, either with his wife or
some other person? A. I remember being out
with him and his wife, but I do not remember
anybody else there.Q. On numerous occasions were you out with
the Ungers? A. No, sir not very often.

Q. You visited at their home? A. Yes, sir.

Q. And they visited you at your home? A.
Yes, sir.

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10033

Q. You knew George Unger was an ex-felon, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, as well as the grounds already urged—requiring this witness to testify against her husband.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes.

Q. You knew he served time in the State Prison in New Jersey for robbery, don't you?

10034

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and upon the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I know he served time; I don't know for what.

Q. Knowing he had served a term in prison, you associated with him and his wife?

10035

Mr. Talley: I object to that on the grounds already urged; it has been already answered in addition to that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. When was your last visit to the Unger apartment—look at me—when was your last visit to the Unger apartment?

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Mr. Talley: I object to it on the same grounds as heretofore urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. The last visit?

Q. Yes. A. I think it was in the middle of April.

Q. 1940? A. 1940.

10037

Q. The Ungers lived at No. No. 3 East 101st Street? A. That is right.

Q. Right off of 5th Avenue? A. Yes, sir.

Q. Did you and your husband stay in the Unger apartment and sleep there?

Mr. Talley: I object to that on the grounds already stated; this witness cannot testify against her husband, and on the ground it is incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10038

A. Yes, sir.

Q. How long did you and your husband stay and sleep at the Unger apartment?

Mr. Talley: I make the same objection upon the same ground; and on the further ground it is not proper cross-examination.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Just a few weeks.

Q. Two weeks? A. About that.

Q. You left there very hurriedly?

Blanche Weiss—For Defts.—Cross

10039

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, on the grounds already urged against this witness testifying to any of these matters.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. You owned a mink coat at that time, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, on the same grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

10040

A. I did.

Q. You left that mink coat at the Unger apartment at the time of your departure?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, no bearing upon this issue, and upon all the other grounds stated.

The Court: Objection overruled.

Mr. Talley: Exception.

10041

A. I did; it was sometime in the spring; I did not need my mink coat then.

Q. That was no indication that you left hurriedly, was it?

Mr. Talley: Objected to as calling for a conclusion.

10042

Blanche Weiss—For Defts.—Cross

The Court: Sustained as argumentative.

Q. You never got the mink coat back?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10043

A. No, sir.

Q. It was put in pawn by your friend, George Unger, who hocked it, wasn't it?

Mr. Talley: I object.

The Court: Sustained as irrelevant.

Q. Now, going back to Rose Simons' apartment, has your recollection now been refreshed that you stopped there with your sister on 79th Street before you went to the Unger apartment in April of 1940? A. I don't remember that.

10044

Q. Can you remember the day that you and Mendy left the Unger apartment, the date? A. I cannot remember the exact date.

Q. To the best of your recollection, what date was it? A. I think it was the middle of April.

Q. Wasn't it your recollection you spent two weeks in the middle of April at the Unger apartment? A. I don't know.

Q. Didn't you, in previous answers, tell me you spent about two weeks at the Unger apartment? A. Yes, sir.

Q. Was it your previous testimony that you got to the Unger apartment about the middle of April? A. No.

Blanche Weiss—For Defts.—Cross

10045

Mr. Talley: I object. That was not her testimony.

Mr. Turkus: The witness has answered no, and that should be sufficient.

Mr. Talley: She did not answer that way.

The Court: She has answered.

Mr. Talley: Exception.

Q. Your recollection is you left the Unger apartment about the middle of April, 1940, is that correct?

10046

Mr. Talley: I object to the form. That is an objectionable question. "Do you understand now?" "Do you remember now?"

Mr. Turkus: I didn't ask her that. That is apparently a filibuster.

Mr. Talley: What kind of a statement is that? I object to it and I ask the Court to instruct the jury to disregard it. It is an offensive remark.

Mr. Turkus: I withdraw it. I am sorry it happened.

10047

Mr. Talley: You ought to be sorry.

The Court: The jury will disregard it.

Q. Is it your recollection you left the Unger apartment with Mendy about the middle of April of 1940? A. That is right.

Q. Does this help fix your recollection? When you left the Unger apartment, the day after you left the Unger apartment, did some story appear in the newspaper that attracted your interest?

10048

Blanche Weiss—For Defts.—Cross

Mr. Talley: Objected to as incompetent, irrelevant, and immaterial, too general; an attempt apparently to cross-examine his own witness, and certainly he has made Mrs. Weiss his own witness, and, having made her his own witness he cannot impeach her by questions like this.

The Court: Objection overruled.

Mr. Talley: Exception.

10049

A. No, sir.

Q. After you left the Unger apartment did you learn from any source that Mendy had been indicted in the Rosen murder? A. No, sir.

Q. When did you learn that for the first time?

A. The night he was arrested in Kansas City.

Q. That was the first knowledge you had? A. Yes, sir.

Q. Now, you left the Unger apartment with Mendy in a Buick car, didn't you? A. I don't remember what kind of a car it was.

Q. It was an automobile? A. Yes, sir.

Q. Whose automobile? A. I don't know.

10050

Q. Who did you leave with? A. I left with my husband.

Q. Hadn't you ever seen that car before? A. I don't remember.

Q. You have been married eight years? A. Yes, sir.

Q. And you don't remember whether you had ever seen that Buick car in which you departed? A. I don't remember if it was a Buick; I don't remember the car.

Q. Had you ever seen your husband with that particular car before you left the Unger apartment with him in 1940? A. I don't remember it.

Q. How many cars did your husband own in 1940 when you left the Unger flat?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He did not own any.

Q. Well, when you left in this automobile from the Unger flat, who was in the car? A. Just my husband and myself.

10052

Q. Did you ask him where he got the car? A. No, sir.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination; an attempt to make the witness testify against her husband.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. You had your suitcases packed up? A. Yes, sir.

10053

Q. And your belongings with you? A. My clothes.

Q. Well, that is your belongings. Did your husband have suitcases with him?

Mr. Talley: Objected to on the grounds already urged; the witness is not capable to testify to that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Did you drive to a hotel in New Jersey?

10054

Blanche Weiss--For Defts.--Cross

Mr. Talley: I make the same objection on the same grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Well, this is only April of 1940. Do you remember where you went to live after you left the Unger flat?

10055

Mr. Talley: I object on the ground this is a cross-examination of his own witness.

The Court: He has a right to test her memory. She testified to a lot of detail as to herself and as to people present five years ago.

Mr. Talley: I take an exception to your Honor's statement as prejudicial.

A. We were traveling and we stopped in many places; I don't remember just exactly where.

Q. Cannot you remember your first stop from the Unger flat when you left?

10056

Mr. Talley: I make the same objection.

The Court: Do you mean they registered there and lived there, in Jersey City?

Mr. Turkus: I said did they go to a hotel in New Jersey. I do not want to tell this witness.

The Court: A person who goes in to telephone or buys a package of cigarettes, that would not make him a resident.

Mr. Turkus: I mean, stayed over night.

The Witness: I don't remember when

Blanche Weiss—For Defts.—Cross

10057

the first stop was; we stopped in so many places I don't remember where it was.

Q. Did you know your destination when you left the Unger flat?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

The Witness: I knew we were going out West.

10058

Q. Did you know where in the West?

Mr. Talley: I make the same objection.

The Court: That comes a little close to a confidential communication. Objection sustained.

Q. Did you go to a hotel around Newark the first night out of the Unger flat?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10059

A. I don't remember that.

Q. Do you remember going to the city of Chicago? A. Yes, sir.

Q. Now, where did you live in Chicago?

Mr. Talley: I object to that on the grounds already stated; she cannot be compelled to disclose that.

The Court: Objection overruled.

Mr. Talley: Exception.

10060

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A. I don't know the name of the hotel.

Q. How long did you stay at a hotel in Chicago?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember; I think it was just a short—

10061

Q. (interrupting) Two days, three days, four days, a week, or how long? A. I think about three days.

Q. You met people in Chicago, didn't you? A. Yes, sir.

Q. Who did you meet in Chicago?

Mr. Talley: I object again on the grounds already urged, and on the further ground it is incompetent, immaterial and irrelevant, and not proper cross-examination.

10062

The Court: Objection overruled.

Mr. Talley: Exception.

A. I met a lot of people there; I don't remember just who they were.

Q. Did you meet a man in the liquor business?

Mr. Talley: That is objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you meet Dorothy Walker?

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10063

Mr. Talley: I object to that on the grounds already urged, and as incompetent, immaterial and irrelevant.

Mr. Turkus: You look at me, never mind looking over there.

Mr. Cuff: I object. That insinuation is not proper.

Mr. Turkus: I did not intend to insinuate.

Mr. Cuff: He said, "Look at me, not over there." He meant towards Mr. Talley and myself.

10064

Mr. Turkus: How did you know that?

Mr. Cuff: I know what you said.

Mr. Turkus: I said, "Don't look over there; look at me."

Mr. Talley: You said, "Don't look over there." A lot of witnesses have a habit of looking at other people besides the examiner.

The Witness: The only time I looked over there was when I heard an objection. It sort of attracts my attention toward the person that is objecting.

10065

Mr. Turkus: Now we will have the question read.

By the Court:

Q. Did you meet Dorothy Walker? A. Yes, sir.

By Mr. Turkus:

Q. Did you meet her son, Milton?

10066

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Mr. Talley: I make the same objection on the same grounds as heretofore stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. At that time Chick Weiss was present? A. No, sir.

10067

Mr. Talley: I object on the same grounds.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Before you took the witness stand did anybody discuss with you—anyone—that the District Attorney was bound by certain answers? Did you hear that expression used? A. No, sir.

Q. You know what an objection is? A. Yes, sir.

Q. Now, in Chicago, didn't you meet a man named Simey Friedman?

10068

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Is it not a fact that the first person you and your husband Mendy contacted in Chicago was Simey Friedman, who conducted a liquor store?

Mr. Talley: I make the same objection; incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Blanche Weiss—For Defts.—Cross

10069

Mr. Talley: Exception.

A. I don't know.

Q. Wasn't Simey Friedman a man who put you and Mendy in contact with Dorothy Walker?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, not proper cross-examination, and objectionable upon the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

10070

A. I don't know anything about that.

Q. Was Dorothy Walker a friend of yours?

A. No.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. A friend of your husband's?

Mr. Talley: The same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10071

A. I don't know; he knew her; I would not call her a friend.

Q. You knew her from Manhattan? A. Yes, sir.

Q. Had you visited her at her home before you met her in Chicago? A. No, sir.

Mr. Talley: I make the same objection.

10072

Blanche Weiss—For Defts.—Cross

The Court: Objection overruled.
Mr. Talley: Exception.

Q. Had she visited you at your home? A.
No.

Q. Did you have her address in Chicago when
you left New York?

Mr. Talley: I make the same objection
on the grounds already urged.

10073

The Court: Objection overruled.
Mr. Talley: Exception.

A. No, sir.

Q. Did you get the address in Chicago from
someone?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. I did not get it from no one.

Q. Do you know who got it?

10074

Mr. Talley: Same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. No.

Q. When you met the Walkers, who was in
your company?

Mr. Talley: I make the same objection.
The Court: Objection overruled.
Mr. Talley: Exception.

A. Just my husband.

Blanche Weiss—For Defts.—Cross

10075

Q. Where did you meet the Walkers in Chicago?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. We went over to her house.

Q. Where was her house? A. I don't remember.

10076

Q. From the house did you go to a hotel to eat together?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Didn't you go to see a moving picture together? A. That was not the same day.

Q. What day was it you went to the movies?

A. It may have been the following day.

Q. Was that the day you ate dinner at the hotel? A. I don't ever remember eating a dinner in a hotel.

10077

Q. Do you remember having drinks in the hotel, or anything to eat or drink in a hotel with the Walkers? A. No, sir.

Q. Was there a conversation between the Walkers and Mendy and yourself?

Mr. Talley: I object to that on the grounds already stated.

The Court: Objection overruled.

10078

Blanche Weiss—For Defts.—Cross

Mr. Talley: Exception.

A. Yes, sir.

Q. The Walker woman at that time had a flat on Foster Avenue, in Brooklyn, didn't she?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10079

A. I don't know.

Q. You don't know? A. I hardly ever saw her.

Q. Was there any conversation in Chicago with the Walker woman about her apartment on Foster Avenue, Brooklyn?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

10080

Q. Was there any conversation in your presence about the Walker woman staying in Chicago and keeping away from New York?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Was the conversation merely social?

Mr. Talley: I object to the form of the question, and on the grounds already stated.

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10081

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. So that your visit to the Walker woman and Milton Walker, whom you knew by having visited at her home, or their home, was simply casual and confined to social matters?

Mr. Talley: I object to that.

The Court: Objection overruled.

Mr. Talley: Exception.

10082

A. Yes, sir.

Q. Was any business discussed?

Mr. Talley: I make the same objection, as I have already urged, and as having been already answered.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. At no time while you were in Chicago did you see Chick Weiss?

10083

Mr. Talley: Objected to on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Do you understand that you are under oath?

10084

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Mr. Talley: I object to the question, and I ask your Honor to direct the District Attorney not to repeat it. He has tried that before.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Do you know Chick Weiss? A. Yes, sir.

Q. What is his right name? A. Ben.

Q. In the automobile rental business? A. No, sir.

10085

Q. Any relation to Mendy Weiss? A. Yes.

Q. A cousin? A. No.

Q. What relation? A. His sister is married to my husband's brother.

Mr. Talley: While there is a change in the guards, may I ask the Court to direct the officer to stand back from the witness, not directly behind the witness as the last officer did? May we have the court officer removed, or if he stands there, that he stand back against the wall and not against the chair of the witness?

10086

The Court: That is incorrect in several details. He is behind the witness and almost flat against the wall.

Mr. Talley: The last officer who was just relieved stood within three inches of the back of the chair of this witness.

The Court: You should have called the Court's attention to it then.

Mr. Talley: I did not want to interrupt.

The Court: If your observation was

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10087

accurate. It occurred to me just as was just stated.

Mr. Turkus: This is about the same situation that we had on Saturday, with certain papers on my desk, and the record does not indicate there is a rail here which blocks the view of the papers on my desk.

The Court: Please proceed with the examination.

Q. Referring to the individual named Friedman in Chicago, does the first name, "Sammy" refresh your recollection? A. No, sir.

10088

Q. While you were in Chicago you took the Walkers for a ride, didn't you? A. Yes.

Q. In an automobile? A. Yes.

Q. The same automobile you left the Unger flat in? A. That is right.

Q. What was the make of the automobile, can you remember now? A. I don't remember.

Q. Was it a sedan? A. A sedan car with four doors?

Q. A sedan may have two doors. Is it a hard top vehicle, all enclosed? A. Yes, sir, it was all enclosed.

10089

Q. Four door? A. I don't remember that.

Q. Black, in color? A. I don't remember that.

Q. This was April, 1940, as you say, can't you remember whether it had four doors or whether it was black in color?

Mr. Talley: I object to the cross-examination of his own witness.

Mr. Turkus: My witness?

Mr. Talley: Yes, you made her your

10090

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witness on these matters; whether the Court says so or not, that is what you are doing.

The Court: Judge Talley has ruled. You may now proceed.

Q. Do you remember whether the car was black in color? A. No, I do not.

Q. Do you remember what State the license plates were from?

10091

Mr. Talley: I make the same objection as urged before; one cannot be compelled to testify; on the ground it is incompetent, immaterial and irrelevant; cross-examination of his own witness.

The Court: It is a memory test. She had been in it every day, or got in it frequently. How correct is she in her memory?

Mr. Talley: It is not the purpose of testing memory, Judge. You should know that by this time.

10092

Mr. Turkus: I object to that statement.

Mr. Talley: I know it and the jury knows it. It is not the purpose of attacking her memory at all. It is an attempt and an effort to bring out testimony he is not entitled to. I had hoped your Honor had seen it. I don't know how I can make it clear any more than I have tried to.

The Court: Thank you. Proceed.

Q. Do you remember what State the license plates were from? A. Yes, sir.

Q. What State? A. New York.

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10093

Q. Before you went to Chicago in the car, hadn't you been up-State around Albany with Mendy?

Mr. Talley: I object on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Hadn't you visited people or friends who conducted a cabaret about twenty miles outside of Albany, before you went to Chicago?

10094

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Weren't you in a steak house before you went to Chicago? A. I don't know whether it was steaks. I might have been in a restaurant.

Q. But "steak house" does not refresh your recollection? A. No, sir.

10095

Q. A cabaret, twenty miles from Albany, does that refresh your recollection? A. I was to no such place.

Q. You took the Walkers for a ride in this car, didn't you? A. About once or twice.

Q. And you spent considerable time with the Walkers, didn't you, in Chicago?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the same grounds already urged.

The Court: Objection overruled.

10096

Blanche Weiss—For Defts.—Cross

Mr. Talley: Exception.

A. I would not say very much time.

Q. Who else did you entertain in Chicago besides the Walkers, if any one?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10097

A. We did not entertain anybody.

Q. You entertained the Walkers, didn't you?

A. We saw them. I don't know what you mean.

Q. You took them to the moving pictures, didn't you?

Mr. Talley: Let her finish her answer.

The Witness: They went with us.

Q. They were guests, weren't they? A. I would not call them guests.

Q. Your husband paid, didn't he? A. Well, it would only be natural with a woman there that my husband should pay.

10098

Q. Naturally or not, he did pay all the expenses for the entertainment, didn't he? A. I did not watch him that closely.

Q. Who else did you and your husband take out while you were in Chicago than those you stated?

Mr. Talley: Objected to on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Nobody else.

Q. You had no friends in Chicago? A. I had friends, yes, sir.

Q. Your husband had no friends or relatives in Chicago, did he?

Mr. Talley: I object to that on the grounds already urged.

The Court: She can say if she knows. Objection sustained as to form.

Q. To your knowledge, did your husband have any friends or relatives in Chicago?

10100

Mr. Talley: I make the same objection as urged; she should not be compelled to testify.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not relatives, but I know he knew people there.

Q. Did he visit people? A. Not as I know of.

Q. So the only one he visited in Chicago was Mrs. Walker, Dottie Walker and Milton Walker, is that correct?

10101

Mr. Talley: I object. That is not calling for her knowledge.

The Court: So far as you know.

The Witness: Yes, sir.

Q. From Chicago, where did you go?

Mr. Talley: The same objection, if your Honor please, on the ground she cannot

10102

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be compelled to testify against her husband.

The Court: Objection overruled.

Mr. Talley: Exception. And on the further grounds already urged— Exception.

A. We made so many stops, Mr. Turkus, I just cannot remember every little place.

10103

Q. I know that, I don't expect you to remember every little thing that happened in 1940 on a trip, but what was the next city you stayed at, the hotel?

Mr. Talley: I object to the form of the question, and on the grounds formerly urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot remember the places.

10104

Q. When you stopped at the Chicago hotel, under what name were you living? A. I don't remember.

Q. Well, it certainly was not Weiss, was it? A. No.

Q. Well, can you remember what name you used in Chicago when you stayed there for several days on this trip?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. My husband registered. I don't know what name he put down.

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10105

Q. What did the bell boy and the other people in the hotel call you, Mrs. what?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant, and on the same grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Did you use so many different aliases when you went around with your husband that you cannot remember them?

10106

Mr. Talley: Objected to as highly prejudicial; incompetent, immaterial and irrelevant; and on the grounds already urged.

The Court: Objection sustained.

Q. Before you left the Unger flat, and while you were living there, did Yiddle Lorber visit there? A. Yes.

Q. Did Al Engelson visit there?

10107

Mr. Talley: I make the same objection there and if we are going to have an enumeration now of names such as have been plastered through the trial, I ask to have—

Mr. Turkus: I don't plaster anything in this trial. They are his client's associates, not the District Attorney's.

Mr. Talley: Will you let me finish my objection, please?

The Court: Overruled.

10108

Blanche Weiss—For Defts.—Cross

Mr. Talley: Exception.
(Pending question read).

A. Yes.

Q. Did Chick Weiss visit there?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

10109

A. Yes.

Q. Did Sidney Weiss visit there? A. Yes.

Q. Did Farvel Cohen visit there?

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

A. No, sir.

Q. You knew Farvel Cohen? A. Yes, sir.

Q. How many years? A. About twelve years.

Q. Visit at his home? A. Yes.

Q. He visited at your home? A. Occasionally.

10110

Q. You knew him as Little Farvel?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Did you know his business? A. No, sir.

Mr. Talley: Same objection.
The Court: Overruled.
Mr. Talley: Exception.

Blanche Weiss—For Defts.—Cross

10111

Q. In the twelve years of acquaintanceship with Farvel Cohen, did you ever know his business?

Mr. Talley: Same objection.

A. No, sir. I was friends with his wife.

Mr. Talley: When I object, Mrs. Weiss, will you wait until the Court rules, please?

The Court: Overruled.

Mr. Talley: Exception. Now go ahead.

10112

Q. When Yiddle Lorber was in the apartment, was Mendy Weiss in the apartment?

Mr. Talley: Same objection, if your Honor pleases, upon the ground first urged. She cannot be compelled to testify—

The Court: Sustained.

Q. Did you know Yiddle Lorber's business?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

10113

A. I knew he was in the bonding business.

Q. How many years did you know him? A. I know him a very long time. I don't remember just how long.

Q. Fifteen years? A. Maybe more.

Q. And all you knew of him was that he was in the bonding business? A. Yes, sir. I was not intimate with him.

Q. Did you know Allie Engelson's business?

10114

Blanche Weiss—For Defts.—Cross

Mr. Talley: Same objection, if your Honor pleases, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I took it for granted he was in the same business.

Q. As Lorber? A. That is right.

10115

Q. Did you know that Yiddle Lorber had a place out in Williamsburg, in Brooklyn?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. You spoke with these men when they came to the Unga flat? A. Yes, sir.

Q. Any other men visitors at the Unga flat while you were stopping there?

10116

Mr. Talley: Same objection, incompetent, irrelevant and immaterial; on the grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you know that Yiddle Lorber was a fixer?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Blanche Weiss—For Defts.—Cross

10117

Mr. Talley: The question means exactly nothing. Exception.

A. No, sir.

Q. When he came to the Unga flat, did he come with anyone?

Mr. Talley: Objected to as calling for a conclusion; also the grounds already urged.

The Court: Sustained upon the first ground.

10118

Q. In your hearing and presence did Lorber report some information?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial, and also upon the grounds previously urged.

The Court: You may answer yes or no.

A. Can you repeat that question?

(Pending question read.)

10119

A. What kind of information?

Q. Some information allegedly in connection with the O'Dwyer investigation in Brooklyn.

Mr. Talley: Objected to as requiring this witness to testify against her husband.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

10120

Blanche Weiss—For Defts.—Cross

Q. How long after Yiddle Lorber's visit was it that you and Mendy left the Unga flat?

Mr. Talley: That is objected to upon the ground it is compelling this witness to testify contrary to law.

The Court: Sustained.

Q. How long after Yiddle's visit was it before you left the Unga flat?

10121

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; upon the grounds already urged.

The Court: Sustained.

Q. All along this route from the Unga flat until your final destination, you went under an alias or assumed name other than your true name; is that correct?

10122

Mr. Talley: That is objected to on the grounds of being compelled to testify contrary to law.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Can you remember any of the names you used enroute, on that trip?

Mr. Talley: Objected to upon the grounds already stated.

The Court: Overruled.

Mr. Talley: She and her husband were

Blanche Weiss—For Defts.—Cross

10123

alone on this trip, I beg to remind your Honor. I take an exception.

(Pending question read.)

A. No, sir.

Q. Not a single name?

Mr. Talley: Objected to as having been already answered.

The Court: She has answered that.

Q. From Chicago, what was the next big city you stopped at?

10124

Mr. Talley: That I object to, if your Honor pleases; already being gone into.

The Court: She has answered that.

Mr. Turkus: I did not hear the answer. Will the Court remind me of the answer? I did not hear any.

The Court: I thought she said she did not remember the next place where she stopped.

Mr. Turkus: I did not ask her the next place; I asked her the next big city.

10125

The Court: Next big city.

Mr. Talley: Exception. That is compelling her to testify, and I take an exception to your Honor's ruling.

The Court: Overruled.

A. The next place I remember was Colorado Springs.

Q. Colorado Springs? Where in Colorado Springs did you stop?

10126

Blanche Weiss---For Defts.—Cross

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. At first we stopped in sort of a place where they have cabins.

Q. That was a tourist place? A. Yes.

Q. How long did you stay in the tourists cabins?

10127

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Were you there a week, a day, a month?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember how long we were at the cabins.

10128

The Court: You were not asked "we". You were asked about yourself. Please limit your answers accordingly.

Q. Do you know how long you were at the cabins?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember.

Blanche Weiss—For Defts.—Cross

10129

Q. Have you no recollection of the period of time at all, whether it was a day, a week, a month, or a year?

Mr. Talley: Same objection, upon the ground it was already answered.

The Court: It could not have been a year.

Mr. Turkus: I am trying to give her something—

10130

By the Court:

Q. Was it over a week? A. I think it was.

Q. Was it as much as a month? A. I could not remember.

By Mr. Turkus:

Q. Under what name were you living at the various cabins?

Mr. Talley: Same objection, if your Honor please.

10131

The Court: Overruled.

Mr. Talley: Exception.

A. I am not sure but I think it was the name of Bell.

Q. When for the first time did you live anywhere under the name of Bell, to the best of your recollection?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

10132

Blanche Weiss—For Defts.—Cross

A. Well, I don't know whether that was the first time or whether I used it before, or not.

Q. You don't remember whether you used "Bell" before? A. That is right.

Q. You mean some other year, or on that trip? A. No, I mean on that trip.

Q. Your first name is Blanche? A. That is right.

Q. And you took the name of Rose Bell, is that right?

10133

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Q. Is that right? A. That is right.

Q. Anywhere en route from the Unga flat to Chicago, did you meet Chick Weiss?

Mr. Talley: Same objection, on the grounds already urged.

The Court: Overruled.

10134

Mr. Talley: Exception.

A. No, sir.

Q. Anywhere from Chicago en route to the West did you meet Chick Weiss?

Mr. Talley: Already answered. It is objected to on the previous grounds.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you meet Farvel Cohen in Chicago?
A. No, sir.

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

Q. From the tourist cabins where you lived under the name of Rose Bell, where did you move next?

Mr. Talley: Same objection, upon the grounds urged.

The Court: Overruled.

Mr. Talley: Exception.

A. We rented a small house.

Q. And where was this small house? Don't use the expression "we". When I ask you something, answer that way.

The Court: The District Attorney is permitted to ask these questions only in relation to yourself. Please remember that.

Mr. Talley: The witness has testified, if your Honor please, that she was with her husband all the time.

The Court: Now you have said something that I would not let the District Attorney bring out.

Mr. Talley: It is quite apparent that they were together.

The Court: Proceed.

Mr. Talley: I take an exception to your Honor's remarks and rulings

10138

Blanche Weiss—For Defts.—Cross

Q. Where was this small house that you lived in? A. In Colorado Springs, in the mountains.

Q. Do you know the address of it?

Mr. Talley: Make the same objection as I made to the previous questions. Take an exception.

The Court: Overruled.

Mr. Talley: Exception.

10139

A. No, sir.

Q. How long did you live in this little small house in Colorado Springs?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I remember the street now.

Q. What street? A. I think it was Red Rock, or something like that. They were all new to me.

Q. Was it 204 South 7th Street, Rocky Ford, Colorado? A. No, sir.

10140

Q. How long did you live in this small house?

Mr. Talley: Same objection.

The Court: May I suggest that you don't go too far on memory tests. When you have enough, pass on to something else.

Mr. Turkus: I am going very quickly now, Judge. The time is not consumed by the District Attorney.

The Court: I know that.

Mr. Talley: Judge, this is not the memory test.

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10141

The Court: Will you wait just a minute? The Court views this as proper on the memory test, but, of course, there must be some limitation. It may also be considered as proper under question of traveling under an assumed name.

Mr. Turkus: That is it.

The Court: And on the question of associations.

Mr. Turkus: You know this could be gone over very rapidly if I could get answers.

10142

Mr. Tahey: This witness has answered every question asked, promptly and intelligently. Every question has been answered by this witness.

The Court: It has not been promptly because nearly every one has been interrupted by objection and argument.

Mr. Talley: Certainly I must object when I think questions are not proper.

The Court: I am not saying you cannot. I cannot stop you.

10143

Mr. Talley: I take an exception.

(Pending question read.)

A. I believe about two months.

Q. Did you live there under the name of Rose Bell?

Mr. Talley: Same objection as previously made.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

10144

Blanche Weiss—For Defts.—Cross

Q. Did you communicate with your friends and relatives, or any of them, any time from the time you left the Unga flat until you got to this small house in Colorado Springs?

Mr. Talley: I object to it as incompetent, irrelevant and immaterial; on the grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

10145

A. No, sir.

Q. Did you tell anyone that you were at Colorado Springs?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. From that house, where did you go next?

10146

Mr. Talley: Objected to upon the grounds already urged. Certainly it is not any memory test.

The Court: This goes beyond memory test. The Court is not writing a thesis on the various rules of evidence under which this is permissible. I have not made this exclusively applicable to memory test. Overruled.

Mr. Talley: Exception.

(Pending question read.)

A. We rented another house.

Blanche Weiss—For Defts.—Cross

10147

Q. Colorado Springs? A. Yes.

Q. Did you live there in that other house under the name of Bell? A. Yes, sir.

Q. Rose Bell? A. Yes, sir.

Q. How long did you live in this other house in Colorado Springs? A. I think it was towards the end of September.

Q. While you were in Colorado Springs, did you visit St. Francis Hospital? A. No, I did not go there.

Q. You did not visit there? A. No.

10148

Q. Did you know anybody who was a patient in the hospital?

Mr. Talley: That is objected to.

The Court: Sustained.

Q. From that little house where did you go?

Mr. Talley: That is objected to upon the grounds already stated.

The Court: Overruled.

Q. I should say the other little house. A. From there we went to Kansas City.

10149

Q. Did you ever live at 204 South 7th Street, Rocky Ford, Colorado?

Mr. Talley: Objected to, if your Honor pleases. Already past that. On the grounds already urged, it is objected to.

The Court: Sustained.

Mr. Turkus: We have not passed that, your Honor.

Mr. Talley: You are out of Colorado weeks ago.

10150

Blanche Weiss—For Defts.—Cross

Mr. Turkus: This is a very important question in regards to a very important exhibit in the case. It has never been touched on.

Mr. Talley: Object to the statement, if your Honor pleases.

The Court: You cannot refer to a paper that is marked for identification.

Mr. Turkus: No, in evidence; People's Exhibit 50 in evidence.

10151

The Court: Let me see it. Tell me briefly what it is.

Mr. Turkus: It is the operator's license found in the possession of this defendant, in the name of James William Bell, 204 South 7th Street, Rocky Ford, Colorado; date of issue June 6, 1940.

The Court: That is what I had in mind when I ruled against you. Objection is sustained.

10152

Q. Where did you go from Colorado to Kansas?
A. Kansas City, Missouri.

Q. Where did you live in Kansas City, Missouri? A. On 46th Street Terrace.

Q. Under what name? A. Under the name of Bell.

Q. Did you also live at 700 West 48th Street, Kansas City?

Mr. Talley: Same objection as already urged.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

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10153

Q. Under the Terrace Drive address and the West 48th Street address, did you live under the name of Rose Beli?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. What name? A. Name of Miller.

Q. Where did you live under the name of Miller?

10154

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. On 48th Street Terrace.

Q. That was 700 West 48th Street, Kansas City? A. Yes.

Q. What was your first name when you lived there under the name of Miller?

Mr. Talley: Same objection.

10155

The Court: Overruled.

Mr. Talley: Exception.

A. Rose.

Q. Rose Miller? Did you hear other witnesses interrogated whether Cuppie Migden lived at 700 West 48th Street, while you were a spectator in court?

Mr. Talley: Object to the form of the question.

The Court: Overruled.

10156

Blanche Weiss—For Defts.—Cross

Mr. Talley: Exception.

A. Yes, I did.

Q. Was Cuppie Migden living there? A. No, sir.

Q. Was the manager one Mrs. A. W. Farney at West 48th Street? A. Yes.

Q. Did Cuppie Migden at any time pose as your brother?

10157

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

A. No, sir. He was never there.

The Court: She has answered.

Q. Did you at any time ever introduce Cuppie Migden as your brother?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

10158

Mr. Talley: Exception.

A. No, sir.

Q. Did you move into apartment 302 at West 48th Street, Kansas City, Missouri?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember the number of the apartment.

Q. Third floor. A. Yes.

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10159

Q. Didn't you live there from December, 1940, and leave on April 6, 1941?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Do you recall that you occupied apartment 302? A. I don't remember the number of the apartment.

10160

By the Court:

Q. You mean you did know it but you have forgotten? A. I did know it but I don't remember it.

Q. You have forgotten it? A. Yes, sir.

By Mr. Turkus:

Q. You lived there December, 1940, January, February, March, April, that would be six months in that apartment; is that correct?

10161

The Court: Five months.

Q. Five months rather. A. Yes, that would make it that much.

Q. Having lived in that apartment for five months, you cannot recall now that it was apartment No. 302?

Mr. Talley: Object to that, the form of the question. Already answered.

The Court: Overruled.

Mr. Talley: Exception.

10162

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A. No, I cannot remember the number.

Q. You remember everything about September 12, 1936?

Mr. Talley: I object to that, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

Q. Don't you? A. Yes.

10163

Q. Wasn't there a janitor there by the name of Henry Horton, a colored janitor? A. I only knew his first name.

Q. Henry? A. That is right.

Q. Didn't you tell Henry that there was a death in the family and you were going to leave to go to Denver, Colorado, on April 6, 1941?

Mr. Talley: I object, if your Honor pleases, on the grounds already stated. She is now being compelled to testify to something that she is not required; not binding upon anybody or anything. Upon all the grounds previously urged I object to the question.

10164

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember that.

Q. Don't you remember as far back as April 6, 1941, I mean as recent as April 6, 1941, that you told the colored janitor there, Henry, that there was a death in the family; you had to leave immediately to go to Denver?

Mr. Talley: I object to the question,

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10165

the form of the question, asking if she remembers something that is not in evidence and so far as anybody in this case knows never happened.

The Court: That is quite recent, on something that is more than casual, being in relation to alleged death in the family.

Mr. Talley: The form of the question I object to.

The Court: The question, on the point of memory, is permissible. Overruled.

10166

Mr. Talley: I take exception to your Honor's ruling and statement.

A. What is the question?

Mr. Talley: Is your Honor permitting that question?

The Court. You have had the ruling.

By the Court:

Q. Answer.

10167

Mr. Talley: I take an exception to it.

Q. Do you remember that? A. No, sir.

Q. Do you remember whether you did or not tell that to the janitor? A. No, I don't.

Q. You do not remember one way or the other?

A. I don't think I told that to him.

Q. You don't think so? A. No, sir.

By Mr. Turkus:

Q. You did have a talk with the janitor, Henry,

10168

Blanche Weiss—For Defts.—Cross

before you left that apartment, didn't you? A. Yes.

Q. And there was a man who paid the janitor money before you left the apartment, wasn't there? A. No, sir.

Q. Who paid the janitor the money?

Mr. Talley: Objected to.

A. There was no money coming there—

10169

The Court: Sustained.

Q. Wasn't there any money coming to the Farny woman?

Mr. Talley: I ask the answer be stricken.

The Court: Strike it out.

Q. Did you have a talk with this colored man, Henry, before you left the apartment?

10170

Mr. Talley: Objected to as already answered; incompetent, irrelevant and immaterial.

The Court: She said, "Yes."

Mr. Turkus: If it has been answered—I get so many objections back here I did not hear the answer.

The Court: She said, "Yes".

Q. Was it in reference to paying money? A. No, sir.

Q. Was it in reference to leaving the apartment? A. It was in reference to leaving the

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10171

apartment but not paying any money because I didn't owe any money.

Q. Was that conversation in the presence of Cuppie Migden? A. No, sir.

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception.

Q. Did Cuppie Migden in your presence pay Henry, the colored man, any money for the use of the apartment?

10172

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; upon all the grounds previously urged.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you, while you were living in that West 48th Street apartment under the name of Miller, tell Mrs. Farney and the colored man, Henry, that you were a Government agent?

10173

Mr. Talley: Objected to as incompetent, irrelevant and immaterial; on all the grounds previously urged.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you speak with Mrs. Farney while you lived there?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

10174

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The Court: Overruled.

Mr. Talley: Exception.

A. Very seldom.

Q. Did you speak with Henry while you were there? A. Yes.

Q. Did you say to Henry that you were a Government agent? A. No, sir, I never did—

Mr. Talley: Objected to as already answered.

10175

A. (Continued)—to anybody or to Henry.

Q. When you lived under the name of Rose Bell, at 46th Street Terrace, was the manager of the apartment hotel Miss Evelyn Timms? A. Yes.

Q. And was it from that place that you moved to 700 West 48th Street where you used the name "Miller"? A. Yes.

Q. While you were at West 48th Street, did you get chickens delivered to you from Martin's Indoor Poultry Farm?

10176

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained—I will let that in on the question of memory. You may answer that.

Mr. Talley: I take an exception.

By the Court:

Q. Did you do your own cooking there? A. Yes.

Q. You were the housewife? A. Yes.

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10177

Q. You did the buying? A. Yes.

Q. Did you buy any chickens from Martin's Poultry Farm? A. Yes.

By Mr. Turkus:

Q. And were they delivered to the apartment by Martin himself?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

10178

A. Just once or twice at the very most.

Q. And he brought the chickens right up into the apartment, didn't he?

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. And there were people in the apartment besides yourself when he delivered the chickens?

10179

Mr. Talley: Objected to.

Q. On those occasions?

The Court: Overruled.

Mr. Talley: Exception.

A. Not that I know of.

Q. Were you alone when Martin delivered the chickens to the apartment?

10180

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Mr. Talley: Objected to.

A. My husband might have been there.

Q. But somebody else—

The Court: Be specific. Was Cuppie there?

Q. Was Cuppie there? A. No, sir.

Q. How long do you know Cuppie?

10181

Mr. Talley: I object to it upon the grounds already stated, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I know him many years.

Q. Visit at his home? A. No, sir.

Q. He visited at your home? A. I believe he was there once.

Q. You know him many years. Do you know him from going out socially with him? A. No.

10182

Q. You did not know him from going to school with him? A. No.

Q. Where did you know him from? A. I knew him through my brother-in-law Sidney and through my husband.

Q. Yes? A. That is all, and from the neighborhood.

Q. While you were in Kansas City, Missouri, did you meet a man known as John Jay?

Mr. Talley: Same objection, if your Honor pleases, upon the same grounds.

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10183

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you, while you were in Colorado, meet John Jay?

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Go through the telephone book at this rate.

10184

Mr. Turkus: No, that is where they went through, Judge.

A. Yes, sir.

Q. John Jay is a man about 65 or 66 years of age? A. Yes, sir.

Q. John Jay lived at 204 South 7th Street, Rocky Ford, Colorado, didn't he?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial; upon all the grounds previously urged; not proper cross-examination.

10185

Q. Didn't he? A. Yes, sir.

Mr. Talley: Wait a minute.

The Court: Overruled.

Mr. Talley: I take an exception.

Q. You visited John Jay at that adress, didn't you? A. Yes, sir.

Q. Did you meet Frankie Carbo there on the visit?

10186

Blanche Weiss—For Defts.—Cross

Mr. Talley: Same objection, on the grounds previously urged.

A. I don't know him.

Q. Frank Carbo—

The Court: I don't recall that name. Is that an association?

Mr. Turkus: Yes, a name I brought in for the first time in this case.

10187

Mr. Talley: Exception.

The Court: Is this an association?

Mr. Turkus: That is right.

The Court: Will you connect it up?

Mr. Turkus: I am going to try to connect it through her.

Mr. Talley: Can't do that.

Mr. Turkus: I can't now, of course not, not after I was compelled to make that statement. It was too late.

Q. Did you meet a girl up there known as Petty? A. No, sir.

10188

Mr. Talley: I object, if your Honor please.

The Court: Overruled.

Mr. Talley: Exception.

Q. Were you introduced by John Jay as a relative?

Mr. Talley: I object to that as incompetent, irrelevant and immaterial.

A. Was I introduced?

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10189

Mr. Talley: Just a minute, please.

A. (Continued) To John Jay?

Q. No, were you introduced by John Jay as a relative?

Mr. Talley: Mrs. Weiss, will you kindly refrain from answering when I get up?

The Court: Overruled.

Mr. Talley: Exception. Now go ahead and answer.

10190

A. No, sir.

Q. How many times did you visit John Jay?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. About two or three times.

Q. While you were with John Jay, were you brought in contact with a Mrs. Marie Hormann at Manitou Springs, Colorado?

10191

Mr. Talley: Object to the form of the question on the grounds already urged.

The Court: Overruled.

Mr. Talley: Exception.

A. What is the name?

Q. (Spelling) M-a-r-i-e H-o-r-m-a-n-n, a woman who conducts a renting agency for apartments?

Mr. Talley: I object, if your Honor

10192

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pleases, to the District Attorney testifying who she is.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't remember the name. It might be the woman that I rented the house from.

Q. Yes. A. The second house.

Q. And did that woman live or maintain a business place at Manitou Springs, Colorado?

10193

A. I can't remember whether it is that woman or not.

Q. Wasn't the cottage that you rented rented at \$50 a month? A. No, I believe it was the other one that I rented was from this woman. The name sounds familiar and yet it is not clear to me.

Q. The one in which you lived from July, 1940, until September, 1940, wasn't that one rented from Mrs. Marie Hormann at \$50 a month? A. Well, they were both at \$50 a month. Both houses were at \$50 a month.

10194

Q. Let me ask you this: Did you ever leave a forwarding address when you vacated from any of these premises?

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't know.

Mr. Talley: On the grounds already urged.

Blanche Weiss—For Defts.—Cross

10195

The Court: You mean with the Post Office?

Mr. Turkus: Yes, or with anyone.

Mr. Talley: Is there any evidence—

The Court: Overruled.

Mr. Talley: Exception.

A. Forwarding address?

Q. Yes. A. No, sir.

Q. You never left a forwarding address, is that what you mean? A. I don't remember.

10196

Q. You don't remember? A. I don't remember leaving a forwarding address.

Q. Do you deny that you didn't?

Mr. Talley: Object to the form of the question.

The Court: Sustained. She has answered.

Q. Don't you remember as far back as 1940 and 1941 that you didn't leave forwarding addresses when you moved?

10197

Mr. Talley: Objected to. Already been answered.

The Court: Overruled.

Mr. Talley: Exception.

A. I don't think I did.

Q. That is the best answer you can give?

Mr. Talley: I object to that question.

A. I am almost positive.

10198

Blanche Weiss—For Defts.—Cross

Mr. Talley: Wait a minute.

Q. Now you are almost positive. Are you positive that you didn't?

Mr. Talley: I object to the form of the question.

The Court: Overruled.

Mr. Talley: Exception.

10199

A. I am almost positive.

Q. Were you introduced by John Jay as a daughter-in-law?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Were you introduced to Mrs. Marie Hermann by John Jay as his daughter-in-law?

10200

Mr. Talley: Same objection and already answered.

The Court: Overruled.

Mr. Talley: Exception.

A. I was never introduced by him as a daughter-in-law.

Q. Did you say that you were interested in opening a moving picture theatre in Manitou Springs?

Mr. Talley: Same objection, incompetent, irrelevant and immaterial.

Blanche Weiss—For Defts.—Cross

10201

The Court: Overruled.

Mr. Talley: Exception.

A. To who?

Q. To anybody, including Mrs. Hormann? A. No, sir.

Q. Why did you ask me "To who?"

Mr. Talley: I object to that, if your Honor pleases, highly improper.

The Court: Overruled.

Mr. Talley: Exception.

10202

A. I don't know why.

Q. You don't know why you asked that question? A. I just wanted to know to who you were referring to.

Q. If you had never spoken to anyone, why was it that you asked me "To who?"

Mr. Talley: Objected to. It is highly argumentative, decidedly improper in form and substance.

Mr. Turkus: Merely asking for an explanation.

10203

Mr. Talley: Should not be permitted. I object to it.

By the Court:

Q. Can you answer that?

Mr. Talley: I object to that.

A. I spoke—

10204

Blanche Weiss—For Defts.—Cross

The Court: Overruled.

Mr. Talley: Exception. I object to your Honor's question. Take an exception likewise.

The Court: Overruled.

Mr. Talley: Exception.

Q. You may answer, if you can.

By Mr. Turkus:

10205

Q. You just started to say you spoke and then you were stopped.

Mr. Talley: Let her answer.

Mr. Turkus: Don't you straighten it out. Let her straighten it out.

Q. You just started to say to Judge Taylor you spoke. Now go ahead and finish it. A. There was nice moving pictures in Colorado Springs—

Q. Liberty Theatre?

10206

Mr. Talley: May I have the witness finish the answer?

A. No, it had sort of an Indian name.

Q. Yes. A. And I always like that theatre. I used to talk about it to my husband. I said, "That would be a nice business."

Q. Didn't you speak to anyone about the Liberty Theatre, which was vacant at the time, to rent it and run it as a moving picture theatre?

Blanche Weiss—For Defts.—Cross

10207

Mr. Talley: I object to it, incompetent, irrelevant and immaterial; has no bearing upon any of the issues. It is objected to upon all the grounds urged in objections.

The Court: It is improper because what was said may call for a conversation with her husband.

Q. Any one except him.

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

10208

A. I did not.

Q. You met Bennie Portman out in Kansas City, didn't you?

Mr. Talley: Same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

10209

Q. How many times were you out in the company of Bennie Portman? A. Many times.

Q. You met Walter Rainey out there, too, didn't you? A. Yes, sir.

Q. And you met Maurice Saul out there, too, didn't you? A. Yes, sir.

Mr. Talley: Same objection to all these questions.

The Court: Overruled.

Mr. Talley: Exception.

10210

Blanche Weiss—For Defts.—Cross

Q. And Maurice Saul is affiliated with the Cleaners & Dyers Union of Kansas City, Missouri, isn't he? A. I don't know anything about that.

Q. You have been out many time with the three of them, haven't you? A. I used to come to the Portman's home.

Q. That is right, and he used to go out with Fay Dilly? A. Who did?

Q. Bennie? A. No, sir.

10211

Q. Who went out with Fay Dilly?

Mr. Talley: That is objected to, incompetent, irrelevant and immaterial; upon the grounds already urged. Certainly cannot allow this in.

Mr. Turkus: This will all be connected very quickly.

The Court: Sustained.

Q. Didn't you go out with Fay Dilly? A. Yes.

10212

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

Q. And on the occasions when you went out with Fay Dilly, who was her male escort?

Mr. Talley: That is objected to.

A. We did not go out.

Mr. Talley: Just a minute, Witness. I asked you not to answer—

The Witness: Excuse me, Judge Talley.

Mr. Talley: Your Honor has made a ruling bearing upon this precise matter of the District Attorney and he is now taking another cut around to evade your ruling. It is objected to on the ground this woman cannot be compelled to testify against her husband.

Mr. Turkus: Fay Dilly was not out with her husband and nobody contends that.

Mr. Talley: That is what you are trying to elicit.

Mr. Turkus: I am not.

The Court: Read the question again.
(Pending question read).

The Court: Sustained.

10214

Q. Where did Portman live? A. On Olive Street.

Q. What city? A. Kansas City, Missouri.

Q. You also met him in Colorado Springs, didn't you? A. Yes.

Q. Did you visit him out at Colorado Springs? 10215

Mr. Talley: Objected to, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. How many times? A. Very often.

Mr. Talley: Same objection.

The Court: Overruled.

Mr. Talley: Exception.

10216

Blanche Weiss—For Defts.—Cross

Q. The answer is "Very often". Did he visit you at the cottages in which you lived in Colorado Springs? A. I don't think so.

Q. Did you visit him at his establishment?

Mr. Talley: Same objection, if your Honor pleases.

Q. At Colorado Springs? A. Yes.

10217

The Court: Overruled.

Mr. Talley: Exception.

Q. What kind of an establishment did Portman have at Colorado Springs when you visited him? A. I visited him in a cottage.

Q. In Portman's cottage? A. Yes.

Q. Where was that located? A. That was in Woodland Park.

Q. Do you know the address? A. No, I don't think it was Woodland Park either. I am not familiar with those places. The first time in my life I have been around this place and I am all mixed up with the names.

10218

Q. I see. But at any rate you visited him at his cottage, wherever it was located, in Colorado Springs? A. Yes.

Q. Did you meet Rainey in Colorado Springs as well?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Blanche Weiss—For Defts.—Cross

10219

Q. And did you meet this Maurice Saul in Colorado Springs as well?

Mr. Talley: Same objection, if your Honor pleases.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes.

Q. Where did you meet Rainey and Saul in Colorado Springs?

10220

Mr. Talley: Same objection on the grounds already urged.

The Court: Sustained.

Take the noon recess now. We will reassemble at 1:30. The court-room please be in order.

Gentlemen of the jury, please remember the previous admonitions. Do not discuss the case, let nobody talk to you about it. Keep your minds open.

First, the witness may leave. Come back at 1:30.

10221

The jury pass out the other door.

Defendants are remanded.

(A recess was taken to 1:30 P.M.)

10222

Blanche Weiss—For Defts.—Cross

AFTERNOON SESSION

TRIAL RESUMED

BLANCHE WEISS, a witness in behalf of the defense, resumed the stand and testified further as follows:

By Mr. Turkus:

10223

Q. After the morning recess you were talking to your mother-in-law and Dotty out in the hall, weren't you? A. No, sir, I was talking to my mother-in-law, but not to Dotty.

Q. Wasn't Dotty right there with you? A. No, sir.

Q. How far away from you was she? A. She has not been here.

Q. She has not been here today? A. I did not see her.

Q. Who was the woman alongside of you when you were talking to your mother-in-law? A. This afternoon!

10224

Q. When the court recessed at 12:30. A. 12:30, I was talking to my mother-in-law.

Q. Who was the other woman? A. Oh, that was my niece.

Q. Who introduced you to John Jay?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, also on the grounds already urged.

The Court: Objection sustained.

Q. When was it you met John Jay?

Blanche Weiss—For Defts.—Cross

10225

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Sometime in the summer.

Q. Of 1940? A. Yes, sir.

Q. Did you, knowingly, associate with people with criminal records?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

10226

Mr. Talley: Exception.

A. I did not ask them if they had criminal records.

Q. Didn't you associate with people whom you knew to be convicted criminals?

Mr. Talley: Objected to on the same ground as heretofore urged.

The Court: Objection overruled.

Mr. Talley: Exception.

10227

A. I don't know what you mean by that.

Q. You knew that Unger had been convicted, didn't you? A. Yes, sir.

Mr. Talley: Objected to as not the proper way of proving it.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. You associated with him, didn't you? A. Yes, sir.

Q. You knew that your friend Dotty's hus-

10228

Blanche Weiss—For Defts.—Cross

band, Yonkel, was a convicted pickpocket, didn't you?

Mr. Talley: I make the same objection as heretofore urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He was not always a pickpocket.

10229

Q. How long did you know him? A. I knew him I should say about 15 years.

Q. And in the 15 years you have known him, wasn't he, in 1937, in jail for one year and three months to two and a half years for grand larceny, to your knowledge?

Mr. Talley: Objected to as incompetent and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10230

A. I don't remember what he was away for. I remember him having a restaurant at one time.

Q. How many times do you remember him having been away to jail, to your knowledge?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember how many times; I did not count the times.

Q. Let us see if I can refresh your recollection. On August 11, 1936, wasn't he away in the workhouse for 3 months for policy, to your knowledge?

Blanche Weiss—For Defts.—Cross

10231

Mr. Talley: I object to this. What has this got to do with this trial, getting this before the jury?

The Court: Sustained in that form.

Q. Wasn't he, to your knowledge, away in the workhouse in August, 1936?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10232

A. He was away; I don't remember for what.

Q. Away where? A. He was away in jail.

Q. At that time you were associating with his wife?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. That is right.

Q. A woman whom you knew lived on the proceeds of crime, isn't that right?

10233

Mr. Talley: I object to the form of the question, assuming something not in evidence.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know what she lives on.

Q. You knew the woman more than 12 years?

A. Yes, sir.

Q. You did not know what she lived on? A.

10234

Blanche Weiss—For Defts.—Cross

I know at times her husband had a restaurant, and once he had sort of a beer saloon.

Q. About the times he was in jail, what was she living on, do you know?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10235

A. She was living with her sister.

Q. Did you know he was in the workhouse in 1934?

Mr. Talley: I object to that as highly incompetent and immaterial.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not look up his record.

Q. I know you did not look up his record, but did you know he was in jail in 1934 when you were associating with his wife?

10236

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember the date.

Q. Was he in jail in 1932, in the workhouse, to your knowledge?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

Blanche Weiss—For Defts.—Cross

10237

A. I could not say exactly when he was away.

Q. How many times do you remember him being in jail?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I cannot remember the times; I did not keep it in mind.

Q. Didn't you know when you were associating with him that he was a criminal?

10238

Mr. Talley: That is objected to on the same grounds as heretofore urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. When I first met Dotty he had a restaurant.

Q. Will you swear that during the 12 years you have been associating with Yonkel Isaacson you did not know he was a criminal?

10239

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. You knew many other people you associated with were criminals, didn't you?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

10240

Blanche Weiss—For Defts.—Cross

A. I would not say many others.

Q. How many others? A. I don't know.

Mr. Talley: I make the same objection.

The Court: Overruled.

Mr. Talley: Exception.

Q. Is it so many you cannot estimate? A. No, it is not so many. I don't ask people whether they are criminals or not.

10241

Q. To your knowledge, don't you know that many of your associates were criminals, crooks, thugs? A. No, sir.

Mr. Talley: I object to the form of the question and on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

10242

Q. When you were out in Kansas City, Missouri, you were out there with the intent to avoid the arrest of a fugitive from justice, weren't you?

Mr. Talley: Objected to as a conclusion, incompetent, immaterial and irrelevant, and on all the other grounds I have recited; especially the one I stated the law to you on.

The Court: That is too dangerous. Objection sustained.

Q. Were you there as part of a conspiracy to avoid the arrest and apprehension of a fugitive from justice?

Blanche Weiss—For Defts.—Cross

10243

Mr. Talley: Objected to.

The Court: Objection sustained.

Q. Were you aiding and abetting fugitives from justice when you were out in the West, to maintain themselves in hiding and concealment?

Mr. Talley: I make the same objection. I think it ought to be stopped.

The Court: Objection sustained. No more along that line. It is for the jury to figure out.

10244

Q. While you were in the West you bought a car, didn't you? A. Yes.

Q. In your name? A. Yes, sir.

Q. Through what agency? A. I think it was Ralphman—I am not sure of the name.

Q. Was it the Grausman Ford Agency? A. Yes, sir.

Q. Did you pay \$1,000 in cash for it?

Mr. Talley: I object to it as incompetent, immaterial and irrelevant.

10245

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. You bought Kansas City, Missouri, plates for it?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant, and upon the grounds previously asserted.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not buy them.

10246

Blanche Weiss—For Defts.—Cross

Q. What? A. I did not buy them.

Q. You did not buy them, the plates, you mean? A. Yes, sir.

Q. John Jay was with you when you bought the plates?

Mr. Turkus: Question withdrawn.

Q. John Jay was with you when you bought the car?

10247

Mr. Talley: I object to that on the same ground.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. And so was Albert Anastasio with you when you bought the car? A. No, sir; I don't know him; I never saw him in my life. Don't be accusing me of anything—

10248

Q. Were you ever at the Grossman Agency in connection with the purchase of an automobile in the company of Joseph Lorino?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on all the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know him; I never heard of the name.

Q. Now, you were introduced to Otto M. Blake, who operates a filling station in Black Hawk, Colorado, on that western trip?

Blanche Weiss—For Defts.—Cross

10249

Mr. Talley: Objected to as incompetent, immaterial and irrelevant and on all the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Weren't you introduced as the daughter-in-law of John Jay to a man named Otto M. Blake, who operated a filling station in Black Hawk, Colorado?

10250

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds previously stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Were you in Black Hawk, Colorado? A. No, sir.

Q. Were you introduced to Harry S. Blake, the owner of the Chihuahua Tungsten Mining Company?

10251

Mr. Talley: Objected to on all the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you meet Charles M. Beck on your Western trip?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

10252

Blanche Weiss—For Defts.—Cross

Mr. Talley: Exception.

A. No, sir.

Q. Were you present when \$500 was passed over for an interest in the Chihuahua Tungsten mine?

Mr. Talley: I make the same objection.

The Court: Objection sustained.

10253

Q. Now, Portman's home was at 3543 Olive Street, in Kansas City, Missouri? A. Yes, sir.

Q. That is a place you frequented, isn't it? A. That is right.

Q. And Benny Portman was a notorious gambler in Kansas City, Missouri, wasn't he?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant, and upon all the grounds previously urged.

The Court: You mean a professional gambler?

Mr. Turkus: Yes.

10254

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not to my knowledge.

Q. Didn't you visit professional gambling joints run by Portman in Colorado and Missouri?

Mr. Talley: Objected to on the ground it is incompetent, immaterial and irrelevant, and also on the grounds previously stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. What business was Portman in?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Well, I know he had one place of electrical supplies, lamps, and things like that; and that he was also interested in some place that made medicine.

Q. Yes. A. That is all I know of.

10256

Q. What business was Rainey in?

Mr. Talley: I make the same objection.

The Court: Same ruling.

Mr. Talley: Exception.

A. I don't know.

Q. What business was Saul in?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

10257

A. I don't know.

Q. Didn't you, in Kansas City, Missouri, under the name of Rose Bell, join a ladies' society?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. If you mean knitting for the Red Cross and the British—

10258

Blanche Weiss—For Defts.—Cross

Q. I mean Bundles for Britain. You joined that under the name of Rose Bell? A. Yes, sir.

Q. That was to give a color of legitimacy to the use of the name Rose Bell?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10259

A. It was not to give any color; it was because I wanted to do it.

Q. That was not to hide your identity, was it?

A. No, sir.

Q. You were not concealing your identity from anybody, were you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

10260

A. I was known as Rose Bell.

Q. When you were known as Hoffman, was it Blanche Hoffman, or Rose Hoffman, which? A. Blanche.

Q. When you were known as Miller, what was it, Rose, or Blanche Miller?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Rose.

Blanche Weiss—For Defts.—Cross

10261

Q. When you were known by the name of Newman, was it Blanche, or Rose Newman?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Blanche.

Q. Did you have those aliases to hide and conceal your identity?

Mr. Talley: Object to the form of the question.

The Court: Let the jury figure that out. Objection sustained.

Mr. Turkus: I ask to have this paper marked for identification.

(Received and marked People's Exhibit Z-28 for identification.)

Q. I show you People's Exhibit Z-28 for identification and ask you if that man was not at Grausman's agency when you were negotiating for the purchase of a car in Missouri.

Mr. Talley: I object to that on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Do you know who that man is? A. No, sir.

Mr. Talley: I object to that as not the proper way of identifying a photograph.

10262

10263

10264

Blanche Weiss—For Defts.—Cross

Q. Was that man ever in your society and company? A. I never saw him in my life.

Mr. Turkus: May the record indicate it is being put in the District Attorney's pocket? (referring to last exhibit for identification)

Mr. Talley: I might make a remark on that, but I will not.

10265

Q. Did you knowingly associate with people engaged in criminal activities in Kansas City, Missouri?

Mr. Talley: I object to that on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you ever visit Leavenworth Prison while you were in Kansas City, Missouri?

10266

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you know how far away from Leavenworth Prison Kansas City, Missouri, was, when you lived there?

Mr. Talley: I object to that as incompetent, immaterial and irrelevant, what difference does it make?

The Court: Same ruling.

Blanche Weiss—For Defts.—Cross

10267

Mr. Talley: Exception.

A. No, sir.

Q. On April 6, 1941, you left Kansas City, Missouri? A. Yes, sir.

Q. And you left in an automobile? A. Yes, sir.

Q. An automobile you bought at the Grausman Agency? A. That is right.

Q. There was a driver at the wheel? A. Yes, sir.

Q. The driver was Sidney Weiss? A. Yes, sir.

Q. You drove back to New York City? A. Yes, sir.

Q. Where did you go when you came back to New York City?

10268

Mr. Talley: Objected to on the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I went to see my family.

Q. After you saw your family, where did you go to live?

10269

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I was not feeling well and I went to Atlantic City.

Q. Now, when you bought that car in Grausman's Agency, what name did you give?

10270

Blanche Weiss—For Defts.—Cross

Mr. Talley: Objected to on the grounds previously stated; already testified to.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Rose Bell.

Q. Did you give the address, 204 South 7th Street, Rocky Ford, Colorado?

10271

Mr. Talley: I make the same objection on the grounds previously urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not give any address.

The Court: Pardon me just a minute. I am trying to think of two things at once. I will sustain the objection.

Q. Did you give the address of John Jay as your address when you bought the automobile at Grausman's Agency?

10272

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. All I remember doing is I signed my name.

Q. You don't remember giving any address?

A. No, sir.

Q. That was in 1940, when you bought the car? A. I think my husband gave the address.

Q. Don't talk about "think." A. I did not give it. I cannot tell you I gave it.

Blanche Weiss—For Defts.—Cross

10273

Q. You don't remember giving it, or didn't you give it? A. I did not give it.

Q. You should have said that and nothing else. Did you buy a 1941 tag at Kansas City, Missouri, for your car?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10274

A. I did not.

Q. Did you buy insurance from E. R. Dragow in Kansas City, Missouri, for the car?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not.

Q. At any time before April 6, 1941, did you directly or indirectly, by telephone, letter, telegram, or any other way, communicate with a single one of your relatives? A. No, sir.

10275

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. Did you at any time prior to April 6, 1941, communicate directly or indirectly, by telephone, Western Union, letter, or any other means, with

10276

Blanche Weiss—For Defts.—Cross

any single friend of yours back in New York City? A. No, sir.

Mr. Talley: Objected to on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Who is Alice?

10277

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I have a niece named Alice, but she did not go with me.

Q. Who is the Alice you used to pal around with, you and Dotty Isaacson?

Mr. Talley: I object to the form of the question.

10278

The Court: Objection overruled.

Mr. Talley: Exception.

A. I once had a friend by the name of Alice.

Q. What was her last name? A. Eisenthal.

Q. How do you spell that? A. (spelling) E-i-s-e-n-t-h-a-l.

Q. How many years have you known Alice Eisenthal?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Ever since I have been a child.

Q. Where does she live?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know; I have not seen her in years.

Q. How many years is that you have not seen her? A. I believe four years.

Q. Where did she live four years ago?

Mr. Talley: I object to it as too far afield. That is what it seems to me to be.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know; I was not even intimate with her at that time.

Q. You went to Atlantic City with Dotty?

A. No, I went by myself.

Q. You met Dotty in Atlantic City? A. Dotty met me there.

Q. Was it by coincidence or appointment? A. Not at all. When I left I told my brother-in-law, Sidney, to tell somebody to come out and stay with me because I did not feel well.

Q. You left a message with Sidney to send someone to join you? A. Yes, sir.

Q. And the one that joined you was Dotty Isaacson? A. Yes, sir.

Q. You heard Dotty Isaacson testify in this court? A. Yes, sir.

Q. Where was the boarding house? A. It was on State Street.

Q. Not Atlantic and Pacific? A. No.

10282

Blanche Weiss—For Defts.—Cross

Q. Atlantic and Pacific are parallel streets?

A. Yes, sir.

Q. Where on State Street was the boarding house?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

—The Court: Objection overruled.

Mr. Talley: Exception.

10283

A. Well, it was right off the Boardwalk; it was a little ways off, between, I should say—the next street was Pacific.

Q. Did you at any time during the Atlantic City stay, stay with Dotty Isaacson on State Street between the Boardwalk and Pacific?

The Court: (interrupting) State Street is between the Boardwalk and Pacific?

The Witness: Yes, sir. This boarding house was on State Street off the Boardwalk; the next street, I believe, is Pacific.

10284 ~~By the Court:~~

Q. Between the Ocean and Pacific? A. Yes, sir.

Q. Pacific is one long block back; is that right? A. Yes, sir.

Q. That is at the North End, isn't it? A. I don't know just where it is.

By Mr. Turkus:

Q. When you were in Kansas City, Missouri, before you departed with Sidney Weiss for New

Blanche Weiss—For Defts.—Cross

10285

York State, did you talk with a man known as George Green?

Mr. Talley: Objected to as incompetent, immaterial, and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Was Cuppy Migden introduced by you, before your departure for the East with Sidney Weiss, as George Green?

10286

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not see Cuppy Migden.

Q. At Atlantic City, when you were there with Dotty, how many days did you spend with her?

A. Ten days.

Q. What period of time was that, in April or May of 1941? A. In April.

10287

Q. You knew where your husband was at that time—yes or no?

Mr. Talley: I object to that on the grounds heretofore stated.

Mr. Turkus: This is not testimony; this is only as to her knowledge, if she knew where she was.

Mr. Talley: If it is not testimony, don't ask it.

10288

Blanche Weiss—For Defts.—Cross

The Court: She may answer that yes or no.

Mr. Talley: Exception.

A. Yes.

Q. During the ten days you were there with Dotty did you speak at all about the occurrence of September 12, 1936?

10289

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Not one word was mentioned by you or by her? A. I spoke about my husband being away and about the case, but nothing in reference—

Q. September 12, 1936? A. No.

Q. You had been to your husband's lawyer's office, hadn't you?

10290

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not at that time.

Q. When you were in Atlantic City with Dottie and spent ten days with her, did it occur to your mind that you had spent September 12, 1936, with Dottie Isaacsen?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

Blanche Weiss—For Defts.—Cross

10291

The Court: Objection overruled.

Mr. Talley: Exception.

A. Not at that time.

Q. When was the first time that occurred to your mind where you were September 12, 1936?

A. When Sidney came over to speak to me.

Q. When was that? A. That was about in the month of July.

Q. 1941. A. Yes, sir.

Q. You remembered it immediately as soon as he mentioned it? A. No, sir, I did not remember it immediately. What I did remember was—

10292

Q. (Interrupting) Did you, yes or no? A. I have to explain it.

Q. You can explain that to Mr. Talley. Did you? Answer yes or no.

Mr. Talley: That does not necessarily follow. I think you should let the Court rule on that. I ask that the witness be permitted to finish her answer to the question.

Mr. Turkus: The question is susceptible of a yes or no answer, and I am entitled to it as such.

10293

The Court: Just answer yes or no.

The Witness: I cannot answer it that way; I have to explain.

Q. Where were you September 12, 1935? A. I don't remember.

Q. Where were you September 13, 1935? A. I don't remember.

Q. Wasn't September 13, 1935, Sidney Weiss' birthday as well? A. Yes, sir.

10294

Blanche Weiss—For Defts.—Cross

Q. Do you know what day of the week it was, September 13, 1935? A. No, sir.

Q. Don't you know that was a Saturday?

Mr. Talley: I think we may object to that on the ground it was not a Saturday.

Mr. Turkus: Now the question may just as well be withdrawn; the testimony having been given by Mr. Talley.

Mr. Talley: The question should never have been put.

10295

Q. Did you ever attend any birthday party given to Sidney Weiss except the one you say you attended on September 12, 1936? A. No, sir.

Q. That was Sidney's twenty-sixth birthday?

A. Yes, sir.

Q. That is how you remember the party? A. Yes, sir.

Q. Did you ever attend any birthday party of Sammy Weiss?

10296

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Did you attend any birthday party of Maxey Weiss? A. No, sir.

Q. Did you ever attend a birthday party of Solomon Weiss? A. No, sir.

Q. Did you ever attend a birthday party for Murray Weiss? A. No, sir.

Q. Did you ever attend a birthday party of Mrs. Lena Weiss? A. No, sir.

Blanche Weiss—For Defts.—Cross

10297

Q. So the only birthday party of any of the Weisses you ever attended was Sidney's twenty-sixth birthday? A. That is right.

Q. How long do you know Paul Berger? A. I don't know him.

Q. Never was up to his place of business, the Gold Craft? A. No, sir.

Q. You heard Dottie interrogated about that? A. Yes, sir.

Q. Do you deny you took her to the Gold Craft and bought her a mannish suit?

10298

Mr. Talley: I object to that.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I do.

Q. Do you deny knowing Paul Berger? A. Yes, sir.

Mr. Talley: Objected to as already answered.

Q. Do you deny that during the time when Yonkel was in jail you clothed, fed and sheltered Dottie Isaacson?

10299

Mr. Talley: I object to that, to the form of the question as asked.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I never clothed Dottie.

Q. Did you feed her? A. No, sir, never.

Q. Did you shelter her? A. Never.

Q. You never fed her her breakfast? A. Like

10300

Blanche Weiss—For Defts.—Cross

anybody else that would come in the house, I would offer them something to eat.

Q. I am not talking about anybody who came in the house, I am talking about Dottie, tell us about her, did you feed her at your house when her husband was in jail? A. I cannot answer that question that way. She has had breakfast in my house; she has had lunches, and she has had suppers, but I have not fed her.

10301

Q. Let us go back when Yonkel was in jail, didn't you shelter her then? A. No, sir.

Q. Didn't you feed her then? A. No, sir.

Q. Didn't you buy her clothes then? A. No, sir, then or at no other time.

Q. Why, she was your closest female friend, wasn't she? A. Yes, sir.

Q. During the time that Yonkel was in jail, didn't she live with you? A. No, sir.

Q. Now, you can remember that birthday party of 1936? A. Yes, sir.

Q. Can you remember where you were in 1935?

10302

Mr. Talley: I object to that as already having been gone over.

The Court: She said she cannot.

Q. You told us this morning that you had never been out of town before? A. I did not say I had never been out of town before. I said I had never been in those places before.

Q. You have been out of town many times, haven't you? A. Yes, sir.

Q. And in 1935 were you in Hot Springs?

The Court: Virginia or Arkansas.

Blanche Weiss—For Defts.—Cross

10303

A. I know I was in Hot Springs; I do not remember the year.

Q. You do not remember the year? A. No, sir.

Q. Did you ever have a girl friend named Betty? A. No, sir.

Q. Betty Cooper? A. No, sir.

Q. Didn't you ever have a girl friend named Betty who was a shoplifter?

Mr. Talley: Objected to as highly improper; incompetent, immaterial and irrelevant.

10304

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not have a friend named Betty Cooper.

Q. Now, weren't you in Hot Springs in 1935, do you recall that? A. I know I was in Hot Springs.

Q. Weren't you there when you were in Hot Springs in the company of Lucky Luciano?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

10305

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Weren't you there in the company of Frank Costello?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

10306

Blanche Weiss—For Defts.—Cross

Q. Weren't you in the company of Dixie Davis?

Mr. Talley: Same objection.

The Court: Same ruling.

Mr. Talley: Exception.

A. No, sir.

10307

Mr. Turkus: I ask to have this photograph marked for identification.

(Received and marked People's Exhibit Z-29, for identification.)

Q. Were you in the company of any man on that Hot Springs, Arkansas, trip who left the party and went to Florida?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10308

A. No, sir.

Q. Now, do you remember whether you were in Hot Springs in the fall of 1936? A. No, sir.

Q. Can you remember what year you were in Hot Springs? A. I think it was 1935.

Q. Didn't you eat at a place called Studie's?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I may have.

Blanche Weiss—For Defts.—Cross

10309

Q. Didn't you eat at a place known as the Bungalow operated by a mother and daughter?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I do not remember.

Q. Didn't there dine with you at the Bungalow, Charley (Lucky) Luciano, Frank Costello, Charlie Wooley, Dixie Davis and Cuppy?

10310

Mr. Talley: I object; intended to be prejudicial; objected to as incompetent, immaterial and irrelevant.

The Court: Overruled.

Mr. Talley: Exception.

A. No, sir.

Q. After dining at the place known as the Bungalow, did you go to a place known as Jacob's Road House?

Mr. Talley: Same objection; assuming something the witness has denied.

10311

Mr. Turkus: It is withdrawn in that form.

Q. Do you deny you ever dined at a place known as the Bungalow, operated by a mother and daughter?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

10312

Blanche Weiss—For Defts.—Cross

A. I don't remember the place was there.

Q. Do you remember Jacobs' Road House?

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

The Court: Is it your purpose to show that on September 13th he was in Hot Springs?

10313

Mr. Turkus: No, I don't want to announce my purpose because that would be to defeat the purpose.

The Court: All right.

Q. Do you remember Jacobs' Road House? A. No, sir.

Q. Wasn't there a road house in Hot Springs where you used to go for drinks?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

10314

Mr. Talley: Exception.

A. There may have been.

Q. Do you remember having your picture taken at a bar in Hot Springs?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I had my picture taken; I don't remember where.

Q. Don't you remember it was in a bar?

A. There was a photographer that had one of those bars fixed up.

Q. A simulated bar? A. Yes, sir.

Q. Who took the picture with you when you took the picture at Hot Springs?

Mr. Talley: I object to the form of the question on the grounds already stated.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Bee Cooper.

Q. I call it "Betty". Is that what the name was? A. I don't remember any such name.

Q. Bee Cooper was a thief, wasn't she? A. I don't know what she was.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. She was in Hot Springs with you, wasn't she? A. I did not know her to be a thief.

Q. Bee Cooper was your friend? A. I was not very friendly with her. I had just started in to be friends with her at the time.

Q. You met Bee Cooper in the east? A. Yes, sir.

Q. What were you doing with her in Hot Springs? A. She came along with us.

Q. In your party? A. Yes, sir.

Q. That was a pretty friendly party? A. I did not know she was a thief.

Q. You did not know it then? A. No, sir.

10318

Blanche Weiss—For Defts.—Cross

Q. Is this the picture you had taken in Hot Springs, People's Exhibit Z-29, for identification? A. Yes.

Mr. Turkus: I offer it in evidence.

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. It is meaningless.

The Court: Sustained at this time. It may be offered later if connected up.

10319

Q. Now, who was in this party at Hot Springs?

Mr. Talley: I object to that on the grounds already stated.

The Court: She has seen the picture; she has seen somebody in it.

Q. Yes, who else was in that party.

Mr. Talley: Objected to on the same grounds.

The Court: Objection overruled.

10320

Mr. Talley: Exception.

A. Bee Cooper, my husband and Cuppie.

Q. That is Cuppie Midgen? A. Yes, sir.

Q. And the trip to Hot Springs was so that Bee Cooper could visit her husband in Leavenworth Prison, isn't that right?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, and on the grounds already urged.

The Court: Objection overruled.

Mr. Talley: Exception.

Blanche Weiss—For Defts.—Cross

10321

A. She said she wanted to take a rest and at the same time try to go and see her husband.

Q. At Leavenworth Prison? A. Yes, sir.

Q. Now, you knew when you were associating with Bee Cooper that her husband was then presently in jail, didn't you?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Talley: Exception.

10322

A. Yes, sir.

Q. And you went all the way to Hot Springs and spent time with her there, knowing that, didn't you?

Mr. Talley: I object to the form of the question; incompetent, irrelevant, immaterial.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I did not go there for her sake.

10323

Q. Never mind that, but you went with her knowing her husband was presently in jail, didn't you?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. Think back—tell me what year it was you went on this Hot Springs trip.

10324

Blanche Weiss—For Defts.—Cross

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I think it was in 1935.

Q. Are you sure it was not in 1936? A. It may have run into 1936.

Q. Are you sure it was not the latter—the fall of 1936 you were in Hot Springs? A. I am sure it was not.

10325

Q. Where did you stop in Hot Springs? A. We stopped at a small hotel.

Q. Were you in communication with any friends or relatives when you were in Hot Springs, by mail, telephone, telegraph, or any other means of communication?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant. This is 1935. It cannot be identified with the matter at issue here. I also object on the grounds already urged.

10326

The Court: Objection overruled.

Mr. Talley: Exception.

A. Yes.

Q. With whom and by what means?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't know what you mean, "with what means".

Blanche Weiss—For Defts.—Cross

10327

Q. With whom were you in communication, and by what means?

Mr. Talley: I make the same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I may have written cards or letters.

Q. Under what name were you living in Hot Springs?

Mr. Talley: Objected to— This is 1935—on the grounds already advanced.

The Court: Objection overruled.

Mr. Talley: Exception.

10328

A. I don't remember.

Q. What happened to the car in which you rode out to Kansas City, Missouri?

Mr. Talley: Objected to as incompetent, immaterial and irrelevant, as having nothing to do with the issue being tried.

The Court: Objection overruled.

Mr. Talley: Exception.

10329

A. I don't know.

Q. ~~To whom did you give that picture,~~ People's Exhibit Z-29, for identification?

Mr. Talley: Objected to.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. How many pictures did you have taken

10330

Blanche Weiss—For Defts.—Cross

similar to People's Exhibit Z-29, for identification?

Mr. Talley: I object. We have gone far enough on this, I think.

The Court: Objection overruled.

Mr. Talley: Exception.

Q. It might have been three or four.

Q. Now, to whom did you give a copy of the picture?

10331

Mr. Talley: Objected to.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember.

Q. Did you give one to Cuppie?

Mr. Talley: Objected to.

The Court: Objection overruled.

Mr. Talley: Exception.

10332

A. I don't remember who I gave them to.

Q. Did you keep one for yourself? A. I don't remember.

Q. You did not give this picture to the District Attorney, People's Exhibit Z-29, for identification, did you?

Mr. Talley: I object.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir.

Q. Would you hesitate to lie for Mendy?

Blanche Weiss—For Defts.—Redirect—Recross

10333

Mr. Talley: I object to the form of the question.

The Court: Objection overruled.

Mr. Talley: Exception.

A. No, sir, I would not, but I am telling the truth now.

Q. Now you are telling the truth? A. Yes, sir.

Redirect examination by Mr. Talley:

Q. Mrs. Weiss, you have been asked by the District Attorney about Hot Springs in 1935, were there any of Mendy's family there at that time? A. Yes, sir.

10334

Q. Who? A. My mother-in-law.

Q. The elder Mrs. Weiss? A. Yes, sir.

Q. Anybody else? A. I think Mendy's aunt was there, too, at the time.

Recross examination by Mr. Turkus:

Q. You did not go much with the family, did you? A. Certainly, I did.

Q. Mendy's family in Hot Springs? A. With my mother-in-law and my aunt?

10335

Q. I don't mean that. Who did you live with on the trip? A. With my mother-in-law and my aunt out there.

10336

Helen A. Hazley—For Defts.—Direct

HELEN A. HAZLEY, residing at 871 Pavonia Avenue, Jersey City, New Jersey, called as a witness in behalf of the defense, after being duly sworn, testified as follows:

The Court: This witness got up from the audience.

10337

Mr. Talley: Yes, she sat there at my request. She is a stenographer in my office, in no way connected or identified with this matter. I expected to put her on immediately after we convened.

The Court: That is perfectly all right.

Direct examination by Mr. Talley:

Q. Are you a stenographer in the employ of Alfred J. Talley? A. I am.

Q. On September 17, 1941, did you take a statement from a man who gave his name as Harry Cohen, who said he lived at No. 85 Bristol Street, Brooklyn, New York? A. Yes, sir.

10338

Q. Did you, after taking the statement, transcribe it from your stenographic notes? A. Yes, sir.

Q. I ask you to look at the paper I hand you and ask you if that is a correct transcript of the statement made that day by Harry Cohen. A. Yes, sir, that is my work.

Q. That paper was typed by you and you have compared your stenographic notes? A. Yes, sir.

Mr. Talley: I ask the paper be marked for identification.

Lena Weiss—For Defts.—Direct

10339

(Received and marked Defendants' Exhibit Z-10 for identification.)

Mr. Talley: I offer in evidence the exhibit marked for identification Defendants' Exhibit Z-10.

Mr. Turkus: It is an unsigned statement and is objected to as incompetent, immaterial and irrelevant.

The Court: I do not have to read it. Sustained. That is a rule of law.

Mr. Talley: Exception.

10340

(Witness excused.)

LENA WEISS, residing at 10 Monroe Street, New York City, called as a witness in behalf of the defendants, after being duly sworn, testified as follows:

Direct examination by Mr. Talley:

10341

Q. You live at 10 Monroe Street? A. Yes, sir.

Q. That is in New York, Manhattan? A. Yes, sir.

Q. How long have you lived at that address? A. Over 7 years.

Q. With whom do you live there? A. I live with Sidney and Sammy.

Q. Your son Sidney and your son Sammy? A. Yes, sir.

Q. You are the mother of Mendy Weiss? A. Yes, sir.

10342

Lena Weiss—For Defts.—Direct

Q. Those are three sons. How many other sons have you? How many boys all together?

A. I have six boys.

Q. Do you remember the night of September 12, 1936? A. Yes.

Q. Was that a Saturday night? A. Yes, sir.

Q. Did you have a party that night? A. Yes.

Q. What was the occasion for the party? Why was there a party that night? A. It was Sidney's birthday, 26th year birthday.

10343

Q. Your son Sidney's 26th birthday? A. Yes, sir.

Q. Did you have anything to do with arranging that party? A. Yes.

Q. What did you have to do with having the party given? A. Sidney and Mendy—

Mr. Turkus: I object to this as improper.

Mr. Talley: Merely fixing the occasion in her mind as to that particular day.

The Court: Objection overruled.

10344

Q. Tell us what you had to do with arranging that party. A. That was the 26th birthday of Sidney. So a couple of days before Mendy came in the house. I said to Mendy, "I hear you and Sidney had some argument. I did not know what it was, but I want you should make up. It is going to be Sidney's 26th birthday; I want you should make up with him." He said, "Yes, Ma."

Q. Then did he say anything about giving a party? A. Yes.

Q. What was said? A. I said, "I want you should make up." He said, "All right, Ma, you

be in Sammy's store Saturday night at 10 o'clock."

Q. Were you in Sammy's store at 10 o'clock?

A. Yes, sir. He said, "You and Sidney should be at 10 o'clock in Sammy's store."

Q. Did you go to Sammy's store that night?

A. Yes, sir.

Q. Were you there at 10 o'clock? A. Yes.

Q. Did you get there before 10 or after 10?

A. A little before 10.

Q. Was Sammy there? A. A .

Q. How did you go down to the store? A. I took a bus and then down to the store.

Q. When you got to Sammy's store who was there? A. Only Sammy.

Q. Who came along after that? A. A little while Sidney coming in the store.

Q. Anybody else? A. A couple of minutes later Mendy came in.

Q. Now, did you go any place with Mendy and the others? A. Yes.

Q. Where did you go and how did you go?

A. We stood a little in Sammy's store for a couple of minutes. Then Mendy said, "Are you ready? Get in. Get on." So I and Sidney went out in Mendy's—he had a car.

Q. Was anybody in the car when you got into it? A. Yes.

Q. Who else? A. Blanche, my daughter-in-law Blanche, and her friend Dotty.

Q. Then you all got in the car? A. Yes.

Q. Who was driving the car? A. Mendy.

Q. What time was it when you left Sammy's place? Do you know that? A. Exactly I don't know. Maybe—

10346

10347

10348

Lena Weiss—For Defts.—Direct

Q. What is your best recollection? A. Half past 10.

Q. It was after 10 o'clock? A. Yes.

Q. You all got in the car and drove away. Where did you drive? A. He drove to a restaurant.

Q. Where was the restaurant? A. I don't remember where the restaurant was.

Q. Was it uptown or downtown? A. Uptown.

10349 Q. Do you know about what part of uptown it was? A. I don't know. It was very bright lights.

Q. In the theatrical district? A. Yes, sir.

Q. Was it around anywhere near 50th Street and Broadway, or 7th Avenue? A. Yes.

Q. What is your best impression of what street it was, how far uptown it was? A. About 50th Street.

Q. Was it in the center of the theatres there, a lot of theatre lights? A. Yes, sir, all lights from the theatre.

10350 Q. After you had gotten there what happened? A. After we got there near the restaurant, we all went out from the car, and Mendy said, "You wait here and I am going to park the car."

Q. Did you wait for him then? A. Yes, sir, we all waited for him.

Q. Where did you wait? A. Near the restaurant.

Q. On the sidewalk? A. Yes, sir.

Q. Then when Mendy came along did you go into the restaurant? A. Yes, sir, he came along and said, "Let us go in the restaurant."

Q. Did you have something to eat and drink there? A. Yes, sir.

Q. How long did you stay there? A. I cannot remember how long; we had something to drink and eat.

Q. What is your best impression or recollection as to how long you stayed there? A. It could be about one hour.

Q. When you left the restaurant where did you go? A. When we left the restaurant I said—Mendy said, "All right, let us go to the movies."

Q. To the picture show? A. Yes, sir.

Q. Do you know what theatre you went to? A. No, sir.

10352

Q. Was it one of the big theatres on upper Broadway? A. Yes, sir.

Q. Or 7th Avenue? A. Yes, sir.

Q. Was it a very large theatre? A. Yes, sir.

Q. Do you know about what time it was when you got into the theatre? A. I didn't look—it must have been around 12 o'clock.

Q. Did you remain in the theatre during the entire showing of the picture? A. Yes, sir.

Q. Did you wait for the picture to be finished? A. Yes, sir.

Q. Then did you all go out together? A. Yes, sir.

10353

Q. The same ones who went in the theatre came out with you; is that right? A. Yes, sir.

Q. Mendy and Sidney and young Mrs. Weiss and Dotty and yourself? A. Yes, sir.

Q. Have you any idea how long you spent in the theatre or what time it was when you came out? A. I cannot remember. We went through the whole show.

Q. You waited for the whole show? A. Yes, sir.

10354

Lena Weiss—For Defts.—Direct

Q. How long did the show take? As long as two hours? A. Yes.

Q. What is your best recollection or impression as to the time it was when you came out of the theatre? A. About two hours or more.

Q. About two o'clock would you say? A. Yes.

Q. Did you make any suggestion to them when they came out of the theatre? A. Yes.

Q. What did you say? A. I said, "Mendy, it is nice night, let us go for a little ride."

10355

Q. You said that? A. Yes, sir.

Q. Did you go for a drive? A. Yes, sir.

Q. All of you? A. Yes, sir.

Q. Where did you go? A. Around the park.

Q. Central Park? A. Yes, sir.

Q. Then when you got through the drive where did you go? A. We went downtown to Ratner's Restaurant.

Q. Did you go into the restaurant? A. Yes, sir, we all go in the restaurant.

Q. All that you have named? A. Yes, sir.

Q. Including Mendy? A. Yes, sir.

10356

Q. You all went to the restaurant? A. Yes, sir.

Q. Then did you have something to eat and drink there? A. No drink there.

Q. You mean no liquor served? A. No, sir.

Q. They serve tea or coffee or milk? A. Yes, sir. I don't remember. It was too late.

Q. You did have some refreshments? A. Yes, sir.

Q. Did the others have something to eat and drink? A. Yes, sir.

Q. Do you know how long you stayed there? A. We stayed there, I cannot remember.

Q. What is your best recollection, if you have any, as to how long you stayed in the restaurant? A. We stayed there three-quarters of an hour or an hour.

Q. You think about three-quarters of an hour? A. Yes, sir.

Q. When you left there where did you go? A. Home.

Q. Who took you home? A. Mendy.

Q. When you left the restaurant did you all get in the car? A. Yes, sir.

Q. Then they took you and Sidney home to your home in Monroe Street? A. Yes, sir.

Q. That is in the Lower East Side, New York City? A. Yes, sir.

Q. Then did you and Sidney go upstairs and go to bed? A. Yes, sir.

Q. You left the others downstairs? A. Yes, sir.

Q. Now, can you tell us about the time it was that you got home? A. Yes, sir, when we came in the house I said to Sidney, "Look, it is near four o'clock. I did not know it was so late."

Q. It was four o'clock by your clock in your house? A. Yes, sir.

Q. Now, Mrs. Weiss, you know this was Sidney's 26th birthday you are talking about? A. Sure.

Q. There is no doubt in your mind about that? A. Because—

Q. No. There is no doubt in your mind he was 26 years old on the 13th of September? A. Yes, sir, on the 13th.

Q. That was a Saturday and Sunday you were out? A. Yes, sir.

10358

10359

10360

Lena Weiss—For Defts.—Direct

Q. Did you want to say something as to your remembering it was the 26th birthday? A. Yes, sir.

Q. What? A. Because my husband left me five months before; I was left with five children and I had a business.

Q. You had a baby five months after he left you? A. Yes, sir.

Q. That baby was Sidney? A. Yes, sir, that is how I always remember.

10361

Q. You always remember Sidney's birth by the fact he was born five months after your husband left you? A. Yes, sir.

Q. Now, do you remember any other birthday parties of Sidney's which you had? A. No, sir. That's only one birthday party.

Q. You remember that because Sidney and Mendy had a little quarrel before then? A. Yes, sir.

Q. You wanted the boys to make up? A. Yes, sir.

10362

Mr. Talley: That is all.

Mr. Turkus: I have no questions to ask of the defendant's mother.

Mr. Talley: At this juncture I want to ask the District Attorney about the D.D.4's and D.D.5's we requested many days ago. Those police reports.

The Court: I take it you want to get the description?

Mr. Talley: Yes, sir.

The Court: As given of the man who went in to buy cigarettes?

Mr. Turkus: I have had Mr. Joseph go through this bundle of D.D.4's which is

marked as Defendants' Exhibit Z-19, and only two that could possibly refer to any identification by Mrs. Rosen of the defendant Mendy Weiss are contained in these, which Mr. Joseph has put together. I will not only hand those two up, but the entire bundle as well.

The Court: I want you to pick out the one that is wanted. It is not reasonable to ask the Court to wade through a bulky record when counsel can point out what is wanted.

10364

Mr. Turkus: It is elementary what has to be done.

The Court: Who made this, Detective S-u-r-f-t?

Mr. Turkus: Senft.

The Court: Or Detective William J.—

Mr. Turkus: The one that is on the left-hand side is the detective who makes the 5.

The Court: It says "The undersigned". There are two "undersigns".

Mr. Turkus: I think, as a matter of police routine, a commanding officer signs the bundle of these D.D.5's.

10365

The Court: He takes them upon the signature of the detective. I will excuse the jury for a few minutes. Don't discuss the case.

(The jury retired from the court-room.)

The Court: Is Detective Senft here?

Mr. Joseph: He is not here but he is still in the department, I believe.

10366

Colloquy

The Court: He is available?

Mr. Joseph: Yes.

The Court: How about Mrs. Rosen?

Mr. Turkus: Not in the building now but we can get her.

The Court: Is she available? In connection with the resumption of cross-examination of Mrs. Rosen, and as a basis for attacking her identification of Weiss as the man who came into the store. Judge Talley and other defense counsel are entitled to an inspection of this D.D. 4.

10367

Mr. Turkus: I think it is a "5", isn't it?

The Court: 5.

Mr. Turkus: I will find out how quickly we can get her here.

The Court: Have her here at ten in the morning.

Mr. Turkus: Maybe we can finish it today. This is the tenth week or eleventh week—

10368

The Court: Never mind about that. With her here she can be examined, and this is matter not of collateral but of specific impeachment—

Mr. Turkus: I will try to get her here now.

The Court: Pardon me. Therefore, if she denies having said to the detectives any of these things, defense counsel are entitled to put the detective on the stand and prove that she did.

Mr. Talley: May we examine the paper in question?

The Court: You may.

Colloquy

10369

(Paper handed to Judge Talley.)

Mr. Talley: Have the detective here is, I understand, your direction to the District Attorney?

The Court: The direction is that both of them be here at ten o'clock tomorrow morning.

Mr. Talley: May I look at this now?

The Court: Yes.

Mr. Talley: Thank you.

Mr. Turkus: May we not continue with the balance of the defense?

10370

The Court: We will straighten this out before we go any further. I mean to say now Judge Talley and other counsel are reading a paper and will have every opportunity to study its contents.

I should add as to the rights of the defense that if the detective should deny such statements, then the detective may be confronted and cross-examined on the D.D.5 and, in event that becomes necessary, it may be offered in evidence at that time, not before.

10371

It is obvious to me, from this D.D.5, that the attempted corroboration given by Mrs. Rosen of Weiss having gone into that store that night is rendered worthless as evidence. I cannot even submit it to the jury on the charge as being worthy of consideration on a point of corroboration.

Mr. Talley: Do I understand—Mr. Joseph, will you remain here because the District Attorney quoted Mr. Joseph as stating those are the only two papers in

10372

Colloquy

that file of D.D.4's and D.D.5's that have any relation to the identification by Mrs. Rosen of defendant Weiss—is that Mr. Joseph's statement in addition to that of Mr. Turkus?

Mr. Joseph: Yes.

10373

Mr. Talley: Now, in 1936, is there not a statement in which she described Weiss to one of the detectives who interviewed her at her home or place of business, in 1936, immediately after the killing of Rosen, in which she gave a description of the man she says was in the store, and gave a description of him as being 136 pounds and about five foot six in height? That is the paper that I want.

Mr. Joseph: I read these over last week. I don't recall it now.

10374

Mr. Talley: That is the first investigation that was made immediately after the murder, when a description was given, we are given to understand, by Mrs. Rosen of the man who came into the store the night before.

The Court: Did she say she gave a description that night?

Mr. Talley: Gave a description to one of the detectives.

Mr. Cuff: Not that night.

Mr. Talley: She testified before the Grand Jury, as I understand it.

Mr. Turkus: He is confused with that.

The Court: I don't recall that.

Mr. Talley: What I want is the statement that she made, if she made one, the day of the killing or immediately there-

Colloquy

10375

after, to the detectives, in which she gave a description of the man whom she says came into the candy store the night before, in his shirt sleeves. That is the D.D.4 and D.D.5.

Mr. Turkus: Will you turn to the testimony and show me where there is any testimony in the record—

Mr. Talley: What?

Mr. Turkus: I am trying to help you. Go ahead, do what you want.

Mr. Talley: You are trying to help me?

Mr. Turkus: Wait a minute, Judge, you read the wrong name or we helped you read it. The signature of the detective on the second one of the D.D.5's is Henry G. Swift, not Senft, and the first detective is Vincent G. Giordano.

Mr. Joseph: I understand he is retired, Judge, and he is in Florida.

Mr. Talley: Is there anything in that report that you now have indicating a description given by Mrs. Rosen?

The Court: I find nothing in my notes about her having said that she gave a description of the man at that time. I have that when, some considerable time thereafter, Weiss was in custody and was brought into a Federal room by two detectives, she was not at that time sure because he had fattened up. That apparently has relation to the D.D.5. That was two years ago.

Mr. Turkus: That was in 1939, the date of the report.

10376

10377

10378

Colloquy

10379

The Court: The jury is not here. Frankly, the impression I gather is that in this case the wish is the father to the thought, that the likelihood is that she did not link this trifling incident of the man buying a penny cigarette at that time with the murder. Customers come and go in those little stores on a Saturday night. An incident of that kind would not sensibly attract her attention. I did not swallow that when she gave the testimony. There was nothing significant about a man buying a penny cigarette and walking out. It is more likely that if Weiss was in there, he had no reason at all for walking into the back of the store. He could look in from the street. I thought the wish was father to the thought; that as time went by and she felt under the necessity of trying to hook up some sort of corroboration of an accomplice's testimony, that she was giving this in order to help out.

10380

Mr. Talley: You remember that she said she was brought into this court-room to have Weiss pointed out to her after the trial started in?

The Court: Yes.

Mr. Talley: Which would indicate that she made no identification.

The Court: I have had enough practical experience and observation of the way things are done to form an impression that a shop-keeper would not attach any importance whatever to a thing of that

Colloquy

10381

kind, with the numerous customers that come in on a Saturday night.

Mr. Turkus: Will your Honor look at paragraph 6 of that report, that D.D.5?

The Court: Yes.

Mr. Talley: Will you let us, in the presence of your secretary, look over those reports, if your Honor please? I think it would be very helpful and satisfactory.

The Court: You cannot do that. These are secret.

Mr. Talley: This trial is practically completed now. We can gain no information from those reports.

10382

The Court: But there are other trials all through there. These D.D.4's contain lots of matters that are not connected with this trial.

Mr. Talley: My contention is this, that immediately after that crime she was interrogated by some of the officers and that she gave a description, assuming she had any one in mind at all, of the man she says came into the store the night before, and that description could not possibly agree with an adequate description of the defendant Weiss. Those are the things that we are seeking and that we are entitled to, not a report made in 1939 or statement made in 1939; one made in 1936.

10383

The Court: If that D.D.4 is here, it would be the first one in the case.

Mr. Talley: Yes, sir.

The Court: Let the Judge have it.

Mr. Turkus: What file are you referring to?

10384

Colloquy

The Court: The first one. If she gave a description of the man who bought the cigarettes, it would be in the first D.D.5. No. 6 refers to something that has not come out in the evidence in this case.

Mr. Turkus: That may have been the confusion.

Mr. Talley: Confusion on whose part?

Mr. Cuff: There could not have been any confusion about that.

10385

The Court: She has lost her husband and she wants a conviction. That is the story.

Mr. Turkus: That is acting upon the basis that the D.D.5 is accurate. I have information what went on in that room where Major Williams was, what Mrs. Rosen did, from the Federal people. You are proceeding on the theory that that is accurate.

The Court: I am assuming accuracy.

10386

Mr. Turkus: I want the defendants to have any paper or anything that they think can help them in the case but I am telling you I know what the Federal people say went on in that room.

The Court: In other words, you mean if Mrs. Rosen is examined and if the detective is examined to impeach her, if she denies this, and then if the report itself is put in to impeach the detective in case he denies it, that then you will challenge the word of the detective by putting the Federal agents on the stand?

Mr. Turkus: As to what happened in

that room while they were present, yes, on that time of identification.

Mr. Cuff: She denied being in Major Williams' office.

Mr. Talley: Does the District Attorney take the position that he attacks the accuracy of the police report in this case?

The Court: See if you have that other D.D.5 or 4.

Mr. Turkus: I had Mr. Joseph look through every D.D.4. I will go over them myself personally, if you want.

10388

The Court: Will you look over them right now and pick out the one that is closest to September 13th?

Mr. Talley: The first statement she made.

Mr. Turkus: That is not the way D.D.5's are run. You cannot have me produce something that does not exist.

The Court: Mr. Turkus, will you please give me the one closest to September 13th?

Mr. Turkus: Here it is. Here is September 13th. Here is another one September 13th. Here is another September 13th, and another one, and another one. Here is another one, and two more.

10389

The Court: Mark this one for identification.

(Paper marked People's Exhibit Z-30 for identification.)

The Court: Let me have the others. The first one shown makes no reference to it at all.

10390

Colloquy

Mr. Turkus: Here is another September 13th.

Mr. Talley: May we look at it?

The Court: You don't have to. Take the Court's word for it. Just mark it for identification. Mark the next one for identification. This likewise makes no reference to Weiss.

Mr. Talley: Neither one? Then no need of marking them.

10391

The Court: If this case should be a conviction and go to the Court of Appeals you might be asking that body to look at it. The good faith of this Court will not be challenged.

(Paper marked People's Exhibit Z-31 for identification.)

Mr. Talley: As to the record—

10392

Mr. Turkus: In order to keep the record straight, that D.D.5 dated 9/8/39 and the D.D.5 dated 9/14/39 may refer to matters which occurred outside the office of the Federal people. I do not know.

The Court: Don't argue about it. Can you see anything else on the 13th?

Mr. Talley: Is your Honor marking the paper that you handed to me to examine? Has that been given a number?

The Court: Mark that now.

Mr. Talley: D.D.5 or D.D.4, containing two sheets, which the Court permitted me to read. I want marked for identification so we will know what we are talking about.

The Court: Mark it for identification.

Colloquy

10393

(Two sheets marked People's Exhibit Z-32 for identification.)

Mr. Turkus: Here is another paper that is a resume of the homicide case under date of September 13, 1936.

The Court: Mark this for identification. It has nothing to do with the subject matter.

(Paper marked People's Exhibit Z-33 for identification.)

10394

Mr. Talley: Have you any report made by Captain McGowan, Mr. Turkus, on this case? I would like to have that shown to the Court, if you have.

The Court: One thing at a time.

Mr. Turkus: Do you want me to continue to look for September 13th first?

Mr. Talley: Finish.

Mr. Turkus: I am doing this for you.

Mr. Talley: I told you what I wanted.

Mr. Turkus: Don't be so sensitive. Tell me what you want.

10395

Mr. Talley: I am going to tell you again—

Mr. Turkus: Don't make a speech. Tell me what you want.

Mr. Talley: I would like to tell you where you can go.

The Court: Come to order, please.

Mr. Turkus: That was very cute.

I have examined the rest of the file of the D.D.5's and I found none under date

10396

Colloquy

of September 13, 1936, that is date of report under that date.

The Court: Now the 14th.

Mr. Turkus: Yes, here is one from the 14th.

The Court: That is probably in more detail.

Mr. Turkus: I ask that it be marked for identification.

The Court: These are not the papers.

10397

Mr. Turkus: No, the other papers do not refer to this matter. They refer to the defendant Lepke and others.

The Court: I think, in view of the situation, I had better take the time to look through all.

Mr. Talley: That would be more satisfactory to the defendants.

The Court: The Court has asked counsel to avoid conversation. If this is not obeyed, the Court will be compelled to recess and go into another room. I cannot follow these papers accurately if there is a buzz of conversation among counsel in disregard of the Court's request.

10398

Mr. Turkus, I would like the stenographic report of Mrs. Rosen's interview with Assistant District Attorney McCarthy of September 23, 1936. Was there a transcript?

Mr. Turkus: Papers consisting of 18 pages, taken by Assistant District Attorney William E. McCarthy on September 23, 1936, is herewith handed—

The Court: While I am reading these, will you please look through that and see

if she gave a description there? Sit down and take your time.

In these papers it says nothing more on that point, but there is one report dated September 13th in which a description, given by whom is not disclosed, is noted as to one of the four men. I would judge it is a description of either Bernstein or Ferraco. I will read it. It does not say who gave this description. It is signed by Detective King. "25 years, 5-7, 140, dark complexion, clean shaven, sharp profile". That is what makes me think it is probably Bernstein. And then the way the man was dressed, of course, is nothing that means anything here: "Powder blue suit, soft gray hat, collar of shirt open at neck, no tie, either Italian or Jewish." That looks like either one of those two. It could not apply to either Strauss or Weiss. No description of other three.

10400

Mr. Talley: I don't see that that helps either side.

Mr. Turkus: People's Exhibit 31 for identification—

10401

The Court: I am not obliged to tell you that. All other papers have been duly examined.

Mr. Turkus: People's Exhibit 31 for identification, on the back has a description of the persons wanted. That is under date of September 13, 1936, and it is substantially what your Honor read just a moment ago.

The Court: Well, it is sensible that the

10402

Colloquy

person whose appearance was noted was a sidewalk or wheel man, not a shooter.

Mr. Turkus: Your Honor has asked me to read the McCarthy statement of September 23, 1936. I have read it in its entirety. The only thing that might remotely be suggestive of the subject under inquiry, I put a check mark alongside of it.

The Court: Pass it up.

10403

Mr. Turkus: That is not helpful, and after your Honor gets through with it I would like to have that marked for identification.

The Court: Have you read it carefully?

Mr. Turkus: Yes, your Honor. I sat over in the other jury box and read it.

The Court: Cannot afford any mistakes.

Mr. Turkus: No mistakes. If you have any doubt about it, you can read the 18 pages. I read it.

10404

The Court: I think this is a fair statement then, that Mrs. Rosen did not, on being examined by Mr. McCarthy, state the incident of the man coming in, buying a cigarette, and looking around the place. That was not related.

Mr. Talley: The date of that statement was September 23, 1936, is that correct?

The Court: Right. Taken by John F. Matthews, stenographer.

Mr. Talley: Have I the date correctly stated?

The Court: Yes. Mark this for identification.

(Statement marked People's Exhibit Z-34 for identification).

Mr. Turkus: I ask your Honor to look at Defendants' Exhibit C for identification, which is the Grand Jury testimony of Esther Rosen on October 14, 1936, and specifically page 16 thereof.

The Court: Didn't we take that up before?

Mr. Turkus: I want you to read about that.

10406

The Court: What date is this?

Mr. Turkus: October 14, 1936, a month after the murder.

The Court: Didn't counsel see this?

Mr. Talley: No, sir, we did not see it.

The Court: Suppose we read it. It all tends to confirm.

Mr. Turkus: That is consistent with her testimony in the case.

The Court: Yes.

Mr. Turkus: And who it was that bought the cigarettes.

10407

The Court: Where is the little girl now? Is she available as a witness?

Mr. Turkus: She is available as a witness but she does not remember the incident now.

The Court: There is something else here.

Mr. Turkus: She could not identify him. That identification, if you will note, was within a month of the homicide, by picture.

The Court: In reading this to counsel,

10408

Colloquy

I will have to leave out the first part of one answer because that relates to something that is not disclosed.

Mr. Talley: Do you want the record to take this?

The Court: I think it is just as well. "I seen him between eleven and twelve.

Q. And he came in to buy one cigarette at a time? A. He was looking behind the counter. I thought nothing of it."

10409

One more thing here. Yes, I remember counsel saw this. I remember. Something else here reminds me of it.

Mr. Cuff: That is about the money, isn't it, Judge?

The Court: Yes, that is what follows. This was shown up at the bench in the other room at the early part of the trial.

Mr. Cuff: We read it.

10410

The Court: This is further up on the page, before what has just been read: "Next Saturday night I seen some fellow, now that he was killed Sunday, some fellow walked in Saturday night but when I saw the fellow's picture I identified that fellow. He walked in and bought a single cigarette each time." Then follows something else which is hearsay.

Now, gentlemen, I think the procedure is the matter to be discussed. Of course, the routine technical procedure is the one outlined. If you want to short-cut and redirect it on the D.D.5 to the record after I bring back the jury, you may avoid that necessity. But there are certain

Colloquy

10411

things in the D.D.4 which are prejudicial so that all of it cannot go in.

Mr. Talley: All I would want would be just the paragraph pertaining—

The Court: Then suppose you pass it over and I will see what seems to be admissible?

Mr. Talley: There are two paragraphs, I think, on separate pages.

The Court: I am assuming this. Of course, the District Attorney has a right to show that the detective was mistaken, but for the District Attorney to challenge a D.D.5 in the trial of a case where the District Attorney and police have to collaborate might tend to confuse the juridical mind. No. 6 is what I thought was prejudicial. "At 2:30 P. M. September 7, 1939, Mrs. Rosen, accompanied by the undersigned, appeared at Room 816, 90 Church Street, in the office of Major Williams, where Weiss was viewed by Mrs. Rosen." Then follows an identification of Weiss, but in a different connection.

10412

Mr. Turkus: In connection with the premises or adjacent to the premises.

The Court: But not something that has come out in the trial of this case. Do you know what I mean?

Mr. Talley: It is not quite plain to me but it is plain that there are two paragraphs in there which pertain to her identification or failure to identify the defendant Weiss. Those are the two that I think should be read.

10413

The Court: Do you want this to go in?

10414

Colloquy

She stated that Weiss resembled the man who was sitting in an automobile parked near her store a week before her husband was killed, in company with Max Rubin, Lepke, and Gurrah, who had ordered her husband to get out of town if he knew what was good for him. You don't want that, do you?

Mr. Talley: No, that does not belong in at all and has nothing to do with it.

10415

Mr. Cuff: It is imagination anyway.

The Court: Maybe it is and maybe it is not.

Mr. Cuff: Because Rubin testified here and he gives the lie to that.

Mr. Barshay: Judge, I don't want that to appear in the record, jury or no jury. I think it should be stricken from the record.

The Court: Strike it out but put in the record that on the first page, paragraph No. 6 of exhibit was read to counsel and counsel do not wish it to be read to the jury.

10416

Mr. Cuff: We don't want that in the record.

The Court: I have stricken it from the record but I don't propose, in case this goes to the Court of Appeals following an appeal from a conviction, to have the Court of Appeals find it in the record and then think that I failed to disclose it.

Mr. Turkus: What number is that?

Mr. Talley: Z-32 for identification.

The Court: I am passing this back. I put a pencil bracket on the upper part of

Colloquy

10417

No. 2 on the second page; ask counsel for defense to examine it and see if that is what they want and if that is all that they want. The rest of that paragraph refers to what was just stricken out.

Mr. Talley: In addition to the paragraph indicated by your Honor, and I would like you to look at it again, which terminates with the word "before his murder", that is as much as we desire to have in.

10418

The Court: Let me see that.

Mr. Talley: Just a moment. In addition to that, that "murder" is in the middle of paragraph 2 that your Honor designated, in addition to that we want to have read paragraph 4 of the first sheet down to the word "kill", paragraph 4. Will you look at that, please, and on the other page we seek to terminate the brackets after the sentence, "the night before his murder."

Mr. Turkus: I think it ought to go down, as far as D.D.5, People Exhibit Z-32 for identification is concerned, that is the second 5 attached to Z-32 for identification, it ought to go down to "her husband's death" if that is submitted to a jury.

10419

The Court: Have you got those photographs referred to in paragraph 4 on page 1? When it comes to identifying by photographs—

Mr. Turkus: I was not there then. I do not know.

The Court: Isn't it in the record?

10420

Colloquy

Mr. Turkus: Judge, there were a lot of photographs.

The Court: People change in appearance.

Mr. Turkus: I know.

The Court: The photograph may not look like a person when shown a long time after.

Mr. Turkus: The only one that could explain that would be the detective Giordano.

10421

Mr. Cuff: King.

Mr. Turkus: No, Giordano.

The Court: I think, Judge Talley, that 4 is admissible, provided the photographs are produced or can be found to be used in connection with it so the jury can look at the photographs and look at Weiss as he appears today.

Mr. Talley: No, sir, I would not care to have that. She said she could not identify him. Then they have some photographs presented and she says yes. That would not do at all.

10422

The Court: I will rule out four.

Mr. Talley: All of four?

The Court: Yes.

Mr. Talley: Let me note an exception to your Honor's refusal to allow me to read—

The Court: For that reason. The photographs are not here for the jury to compare with the defendant's appearance.

Mr. Talley: Don't have to say anything to the jury about the photographs.

The Court: And they are not authenticated.

Mr. Talley: I am taking just that statement in that paragraph which is quite separate and distinct from the photographs. I am not interested in the photographs.

Mr. Turkus: As it is, the defendant is getting the benefit of hearsay testimony.

Mr. Talley: It is not hearsay at all.

Mr. Turkus: What, then, is it?

Mr. Talley: It is the statement she made in the course of the investigation of the Rosen killing.

10424

Mr. Turkus: That should be something to cross-examine the witness by, not read in something a detective wrote on a report. You are getting every break in the world. You don't seem to realize it.

Mr. Cuff: Mr. Turkus, we know what we are getting and we know what we want.

The Court: Can't this stop? It is hard to think with all this going on.

It has been requested that the bracketed matter include, "candy store of her husband the night before his murder". That is correct?

10425

Mr. Talley: Yes, sir.

The Court: That was meant to be included.

Mr. Talley: In the brackets there, now I request—

Mr. Turkus: At this point, your Honor—

Mr. Talley: Now I request that that portion—

10426

Colloquy

Mr. Turkus: Somebody else has a right to request.

Mr. Talley: Request that that portion of paragraph four that I have indicated to your Honor, terminating at the word "kill" be likewise read to the jury.

10427

The Court: I have stated my notion concerning four, but really this is a matter for agreement. This is legalized as evidence in this form, which is irregular, only by agreement, but if formalities are waived, and Mr. Turkus objects, I shall sustain an objection to four and then you can take your exception.

Mr. Talley: Does Mr. Turkus object to having that report read to the jury?

Mr. Turkus: Let me see what is being done here. I am trying to tell him he is getting a break, but he does not want to listen.

The Court: Can't this colloquy stop?

Mr. Turkus: Yes, your Honor, it will.

10428

Mr. Talley: It can be stopped by your Honor, nobody else.

The Court: Pardon me.

Mr. Talley: I say it can be stopped by your Honor.

The Court: Without a gavel?

Mr. Talley: You don't need a gavel. Just tell him to sit down and not make childish statements. That might stop it. I don't think it will.

The Court: I don't think it is childish. I think it is a sound objection because the failure to identify there is based upon photographs which are not produced.

whereas in paragraph two of the second page, it is based upon the face to face meeting between the defendant Mendy Weiss and the witness. All right, I will put the marks around it. It can be read in evidence.

Mr. Talley: Both paragraphs or only one?

The Court: The one.

Mr. Talley: Just one?

The Court: Yes. Before the jury comes back, take your exception on the other one.

10430

Mr. Talley: I take exception to your Honor's refusal to allow me to read paragraph four—

The Court: I want no discussion on evidence when the jury comes in.

Mr. Talley: —in the Detective Bureau report marked People's Exhibit Z-32, for identification. When the jury comes back I am going to read to it that portion of the report which is marked in the brackets by your Honor.

10431

The Court: It has been marked all around now in the border.

Mr. Talley: All right, let me see it, please, before they come in.

The Court: She had admitted under cross-examination by Mr. Talley that she was not sure at that time because Weiss had fattened up, but, you see, I am letting this in because it goes further than saying she is not sure. She says definitely it was not the man.

Mr. Turkus: That is a statement, your

10432

Colloquy

Honor, that was made by Henry G. Swift, a detective, which is hearsay. I have been deprived of the right to cross-examine him.

The Court: Not deprived. This is not going to be read to the jury unless you consent to it. That is made clear. If you don't consent to it, you will have to go through the regular formalities which have been previously outlined and with which you are familiar.

10433

Mr. Turkus: That will delay the trial another two days.

The Court: Not necessarily. You can decide that.

Mr. Turkus: I will reserve the right until tomorrow morning to put on the detectives and bring the Federal men here.

The Court: Let us know, then, tomorrow morning.

Mr. Turkus: Yes.

The Court: Let the matter remain open tonight and in the morning let us know what you decide to do.

10434

Mr. Cuff: If you are going to have the Federal man, get the photographs.

Mr. Turkus: I was trying to tell you something.

Mr. Talley: You can save that by having it read to the jury and you can attack it in your summation.

The Court: I tell you, Judge Talley—of course, the jury is not here—we know how these things are taken down. We know how easy it is for a person to get the wrong impression as to what is said and have that wrong impression right

away or have it later. There have been constant wrong impressions as to what the Court said throughout this trial. It is quite possible that at the time of the examination referred to in the D.D.4, and Weiss being brought in for identification, that she did say she was not sure, and the detective afterwards put it in as a negative answer in his D. D. 5. I would not put that past anybody as a mistake that can easily be made.

10436

Mr. Talley: Don't you think the reasonable assumption is that these reports are correct?

The Court: There is no assumption. But let us end this. Bring back the jury. We will recess until the morning.

(The jury returned to the court room.)

The Court: Gentlemen of the jury, it has been necessary to read through a substantial mass of police reports. That is the reason for the delay. That work has now been completed. At ten o'clock tomorrow morning we will proceed with the examination of witnesses.

10437

Please do not discuss the case; let nobody talk to you about it. Keep your minds open and follow all other admonitions heretofore given.

Let the jury go out first.

The defendants are remanded.

(Adjournment was thereupon taken to November 25, 1941, at 10:00 A. M.)

10438

Colloquy

Brooklyn, N. Y., November 25, 1941.

TRIAL RESUMED

The Court: I have just been reviewing the testimony of Mrs. Rosen, beginning around page 50, including page 61. I think that is sufficient to use as a basis, if you wish, for specific impeachment.

Mr. Talley: Yes, sir.

10439

The Court: Do you want to use her or do you want to use the detective?

Mr. Talley: I just want to introduce that in evidence, that is all.

The Court: Have you reviewed this since last night, from pages 50 to 61?

Mr. Talley: Yes.

The Court: It seems to me that lays a basis and you could put the detective right on the stand.

Mr. Talley: I am quite in accord with you.

10440

The Court: There is sufficient here already, because this is not a positive identification.

Mr. Talley: Then I don't require her.

The Court: The only question is the detective's conclusion, whether that is based upon something he can recollect she said in order to establish the conclusion as correct—that it went further than any certainty.

Mr. Turkus: With reference to People's Exhibit Z-32 for identification, the first page—the date of the report, 9/8/39

Colloquy

10441

—the detective who made this D.D. 5 is Vincent Giordani. Mr. Giordani is no longer a member of the Police Department, and his whereabouts, from what I can gather, are somewhere in the State of Florida. However, with respect to Paragraph 4 thereof, Detective King, of the 75th Squad was present with Giordani when the occurrence took place and is available as a witness. In addition to that, with respect to D.D. 5, the date of the report, 9/14/39, also Z-32, the identification of Major Williams, of 90 Church Street office, he is no longer there. He is with the United States Army at Fort Benning, Georgia, having first been in M. I. However, we have produced and have available for court testimony Agent White, who was present when the occurrence in Paragraph 2 of that report took place. In addition, we have available the detective, Harry G. Swift, who made the D.D. 5 dated 9/14/39, Z-32 for identification. All those witnesses are in court, available for any use that any of the defendants may wish to put them to.

10442

10443

Mr. Talley: We asked at least three or four weeks ago for these reports. Several times we called attention to the fact they had not been received. If we had received them when we asked for them, we could have gotten Giordani or the rest of them here to identify it. I think the right thing to do is to put those reports in evidence.

10444

Colloquy

Not all of them, but so much of them as we now have under discussion.

Mr. Turkus: The right thing to do is to call living witnesses.

The Court: Who signed the exhibit for identification?

Mr. Turkus: Z-32 for identification, the date of the report, 9/8/39—was signed by Giordani,—the first page. But in Paragraph 4 it says that Detective King was with him when the occurrence took place.

10445

The Court: I just asked a simple question. I am trying to figure out what it is best to do.

Mr. Turkus: The witness, in accordance—

The Court: Wait just a minute. Paragraph 4 states the officer's conclusion; it does not state what Mrs. Rosen said.

Mr. Turkus: That is right.

The Court: The jury is the one to draw conclusions.

10446

Mr. Turkus: I am going to answer—

The Court: Please. I do not want any interruption. Please sit down while I am talking. Now, in reviewing the evidence, as I stated, Mrs. Rosen was unable to make a positive identification. Let me refer to that particular part, at page 59:

“Q. Then did you say, ‘That is the man who was in my candy store,’ or did you say, ‘I cannot identify him as the man’?”

A. I said to him, ‘He looks much heavier. He was not as heavy in the store. I have

Colloquy

10447

not seen him in a few years. He was slimmer when he came in my store.'

"Q. Were you in doubt as to whether he was the man?"—now please bear this very clearly in mind as I read—

"Q. Were you in doubt as to whether he was the man? A. If he was slimmer, I would definitely say he was the man."

Mr. Talley: I think that is sufficient to show that she was not definite as to her identification, and, as I stated, an identification that is not definite is no better than no identification.

10448

The Court: Now, of course, the detective put something in the nature of a conclusion—he goes further than that in his conclusion. But Giordani is not here, and I am facing a practical situation. Why not, if you wish, Judge Talley, consider if you wish to call those who are here and cross the bridge when you come to it.

Mr. Talley: The only man whose testimony would be worth anything in connection with this report is Giordani, who made it, and Major Williams, who was there in his presence, in whose office the statement was made. I don't want any—

10449

Mr. Turkus: Detective King is here.

Mr. Talley: It does not make any difference how many are here.

Mr. Turkus: The agent is here. They were both present on both of those occurrences.

The Court: Let me see if I am correct

10450

Colloquy

in my impression—I was wrong about that. I was wrong in the impression. If Giordani was here he could be asked directly as to that.

Mr. Turkus: Will your Honor look at Paragraph 4?

The Court: I read it.

Mr. Turkus: Did you see about Detective King?

10451

Mr. Talley: It seems a very simple matter to me, if I read to the jury those two paragraphs.

The Court: It seems simple to me, too, but it cannot be done except by agreement.

Mr. Talley: I ask that an agreement be made. The District Attorney agrees, in view of the fact that these witnesses are not here, that that report be read in evidence to the jury.

Mr. Turkus: There was no agreement made by any District Attorney to read the D.D. 5.

10452

Mr. Talley: I said nothing about you making an agreement—nothing. I am proposing that the District Attorney consent to read to the jury the two paragraphs of those reports he has in his possession.

Mr. Turkus: I counterpropose—

The Court: Please stop quarreling. Only when we agree on an orderly course of procedure can I rule. If that paragraph is offered in evidence, and if objection is made, the Court will be compelled to rule according to law.

Colloquy

10453

Mr. Talley: I offer in evidence from the paper marked Z-32 for identification, which is designated a supplemental complaint—"Report. Police Department, City of New York,"—and is dated September 13, 1936, the date I refer to as indicating the date of the first report, September 13, 1936. This report is dated September 8, 1939. Now, I offer in evidence so much of the first page of the two pages of this exhibit as is indicated by the numeral "4," being the fourth paragraph, and I offer in evidence so much of said Paragraph 4 as ends with the word "killed." I offer in evidence supplemental report dated September 14, 1939, as is contained in Paragraph No. 2 thereof and as is indicated by pencil markings made by the Court, the last word of that portion offered being, "murder."

10454

Mr. Turkus: Objected to on the ground it is incompetent, immaterial and irrelevant, and on the further ground Detective King and Agent White and other witnesses are available to be called to the stand.

10455

The Court: I sustain the objection.

Mr. Talley: I take exception and I ask for an opportunity to try to locate these two witnesses.

The Court: Of course, you understand the Court's view. I have tried to make it clear by quotations from the record and the comments therein, that even if this

10456

Colloquy

had not been objected to and had gone in it would be error.

Mr. Talley: It is not necessary, in your Honor's opinion, that the report be put in?

The Court: I don't think it is.

Mr. Talley: Your Honor will charge the jury at the proper time that there has been no identification at all?

10457

The Court: There has been no adequate, no satisfactory, identification by Mrs. Rosen.

Mr. Talley: Your Honor will charge the jury to that effect?

The Court: I will—I told you that yesterday. If you want to find out what Mrs. Rosen said you can bring other witnesses in here, if you wish.

10458

Mr. Talley: I want that report. The witness is the only witness who will validate it. I have nothing further to offer except an offer to get hold of the witness. I could have had him here if these reports had been given to me when demanded and not held until the extreme end of this trial, until yesterday.

Mr. Turkus: That is an outrageous statement.

Mr. Talley: I want the District Attorney stopped.

Mr. Turkus: He made a very improper statement.

Mr. Talley: You held them for two weeks. Two weeks ago I asked for these reports, and you know it.

Colloquy

10459

Mr. Turkus: That is an absolute misstatement of fact. I cannot turn over confidential police files unless directed to do so by the Court.

The Court: These statements to the jury have to be stopped. None of these reports are permitted in evidence under the law. They are confidential police reports and the law is clear on them. That is the law. The rest is all play before the jury.

Mr. Talley: I asked for them so they might be examined.

10460

The Court: I will say the last word, or there will be nothing more said. I will excuse the jury and let you argue it out if you wish.

The Court asked Mr. Turkus to subpoena these P.D.4's, which are incompetent as evidence, in your behalf, because they are confidential police records, and it is not the policy of the law to permit them to be seen by the defense, and, at the proper time, for you to see them. It was yesterday you asked for their production. In the meantime they have been handed by the police to the District Attorney, which avoided the necessity of having the policemen here every day with those exhibits. Now, there is nothing disreputable about that on the part of Mr. Turkus. There will be no further exchange of compliments permitted.

10461

Please proceed with the case.

Mr. Talley: I ask for the production of the man of the route.

10462

Colloquy

Mr. Turkus: Having in mind the Court's statement, I hand the same to you.

Mr. Talley: I offer in evidence map designating street layout bounded by Pitkin Avenue, etc.

Mr. Turkus: Consented to. Do you have any objection if it is marked as a People's Exhibit on your offer, since it is our exhibit?

10463

The Court: What is the date on that layout? Does it show traffic directions and signals? Those change from time to time.

Mr. Turkus: It shows the one-way street—obtained from the official records of the Chief Engineer for the Police Department, City of New York, as of September 13, 1936.

The Court: All right.

Mr. Turkus: The map contains matters which are self-explanatory.

10464

The Court: Does it show the traffic lights as they existed on that date?

Mr. Turkus: No, it does not. The policeman's testimony shows that, but it does not show which lights were in use at that time.

The Court: This was before seven o'clock in the morning?

Mr. Turkus: Yes. The only practical effect is it shows the layout of the streets in connection with the Rosen candy store, the Rosen residence, the Long Island Rail Road, the B.M.T., the I.R.T., and the

Colloquy

10465

route taken on the getaway, as testified to by the People's witnesses. It is data supplied by the official authorities of the Police Department as of September 13, 1936.

The Court: Do they check up with the matters testified to?

Mr. Turkus: Yes.

(Map received and marked Defendants' Exhibit 11, produced by the People.)

10466

Mr. Talley: I ask for an opportunity to endeavor to get Detective Giordani, who made the report indicated on People's Exhibit Z-32 for identification, and also to produce in court Major Williams, referred to in said report, so they may testify as to important questions.

The Court: Better think that over during the day and give it more mature consideration. Personally, I don't think you will want them, I do not think it is of any value whatever because already you have everything you need.

10467

Mr. Talley: Does your Honor deny my application, for the purpose of the record?

The Court: No, I am suggesting that you give it more thought. Renew it later if you still think you want them.

Mr. Talley: With the consent of the Court—I will not renew it—I suppose I should renew it later as an application which has been made.

I have no further evidence to offer, then.

The Court: Then do I understand you

10468

Colloquy

wish the Court to adjourn for a few days until you can, under due process, bring these witnesses up here?

Mr. Talley: That is right.

The Court: Do you seriously mean that?

Mr. Talley: This is very serious business for me, Judge Taylor—the entire trial—terribly serious.

10469

The Court: Of course it is, for the Judge, too, and it is for the jury.

Mr. Talley: It could be so easily obviated by the method I suggested; then I would not have to make this suggestion. It is an important application, and I ask your Honor to pass upon it.

The Court: Personally, I don't think their evidence is worth anything in view of what the Court has said it would charge. How long will it take to get them up, after procedure.

10470

Mr. Talley: I have no idea of where they are, or who they are. The first thing I knew of it was from the District Attorney's disclosure this morning as announced by him.

Mr. Turkus: Mr. Joseph informs me that he was told yesterday. We may be able to get rid of this thing if you will listen to me for a few minutes.

The Court: How?

Mr. Turkus: I am not going to have anything put in evidence which I don't think is fair to Mrs. Rosen, because of the facts that I know, but I will ask your Honor to charge the jury that the jury do

Colloquy

10471

not consider her identification of Mendy Weiss buying cigarettes in the store the night before the murder at all,—take it out of the case.

The Court: Does that satisfy you? Do you still want to adjourn?

Mr. Talley: I still want the report in evidence.

Mr. Turkus: That is sheer obstinacy. At page 3385 of the record last night—

The Court: No more of that before the jury. The Court cannot speculate as to the underlying methods. The Court can only consider the reasonableness of the request. In view of the fact the Court has stated what it would charge the jury on this point, is such evidence of any further value? I think it is purely a matter of superfluity.

10472

The Court would not be justified in leaving the jury for several days and nights in a condition of inactiveness during the session of this trial. There are a multitude of reasons; and it would work against an accurate decision of the issue. I am going to take the responsibility right now and deny the application.

10473

Mr. Talley: Exception.

No further evidence on behalf of the defendant Weiss.

The Court: I will take the defense of Capone.

Mr. Rosenthal: The defendant Capone, with the exception of one stipulation, which I requested of the District Attorney on the direct case and which was partially

Colloquy

10474

agreed to—namely, the questions and answers which were read from other records, were correctly read by me, and all questions and answers of the particular witness in those various records—is that correct?

Mr. Turkus: That is satisfactory.

Mr. Rosenthal: Then I rest on the question of law which I raised to your Honor. We have no proof to offer whatever.

10475

The Court: To be specific in this stipulation, may I add that you try, if possible, to say in respect to what examination of what witness?

Mr. Rosenthal: In so far as the defendant Capone is concerned, the stipulation would be in the form of, if the stenographer were called from the Cohen trial, he would testify that the questions and answers taken from that record, in so far as they are applicable to Sholem Bernstein, are true and correct. If the stenographer were called from the Grand Jury, he or she, whoever it might be, would testify that the questions and answers read from the extracts of those minutes, which your Honor furnished, pertaining to Sholem Bernstein, are true and correct.

10476

The Court: Correct testimony?

Mr. Rosenthal: Yes. And if the stenographer were called in the Strauss and Goldstein trial, which has been referred to particularly in the minutes, the same concession would be in force and effect so far as it affects the testimony of Sholem Bernstein. And in respect to the witness Ma-

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10477

goon, if the stenographer were called that presided in the case of the People against Magoon, that he would testify in a similar manner to the previous concession. I think that covers it.

Mr. Turkus: For the sake of expedition, so stipulated.

Mr. Rosenthal: And likewise in the Strauss and Goldstein case.

Mr. Cuff: And that applies to the questions and answers read by Judge Talley from the record in the Cohen case.

10478

Mr. Turkus: So stipulated.

JAMES P. MALONE, Shield No. 1797, Manhattan Grand Jury, Borough of Manhattan, City and State of New York, called as a witness in behalf of The People, in rebuttal, after being duly sworn, testifies as follows:

By Mr. Turkus:

10479

Q. Are you a detective in the employ of the Police Department of the City of New York?

A. Yes, sir.

Q. How many years have you been so employed by the Police Department? A. Eleven years.

Q. How many years have you been a detective? A. About four years.

Q. On March 5, 1940, what command were you assigned to? A. Manhattan Grand Jury Squad.

Q. Is that the Grand Jury Squad attached to

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the office of District Attorney Thomas E. Dewey?

A. Yes, sir.

Q. Was your immediate superior and commanding officer Captain Bernard Dowd? A. Yes.

Q. On March 25, 1940, did you receive a direction or command from your superior officer, Captain Dowd? A. Yes, sir.

Q. Did you execute the order or command? A. Yes, sir.

10481 Q. On March 28, 1940, was that the date the order was executed, or was it prior thereto? A. March 28, 1940, at one a. m.

Q. Who did you take into custody? A. Mendy Weiss.

Q. When did you bring Mendy Weiss to the District Attorney's office of Kings County? A. About 3 p. m., March 28, 1940.

Q. When you took him to the District Attorney's office, do you recall into whose room you took him, or what Assistant District Attorney, at any rate, was in the room when you brought him in? A. To your room—Mr. Turkus.

10482 Q. When you brought him into my room, did you see anybody in my room at that time? A. Yes, sir, there was a gentleman sitting at your desk, or standing, I am not just sure, but he was present with you, and Johnny Whalen, who was my partner, I asked—

Q. You cannot bring in any talk. What was that man who was in the room doing when Mendy Weiss came in? A. He shook hands with Mendy Weiss and he said, "Hello, Mendy. Your brother Murray retained me for you. If you want me, you know where I will be."

James P. Malone—Rebuttal for People—Direct 10483

Q. Did that man then depart from the office?

A. Yes, sir.

Q. Was the defendant Mendy Weiss questioned by Assistant District Attorney Turkus in your presence? A. Yes, sir.

Q. Did you make notes of that interrogation?

A. No, sir, I did not.

Q. Did you make any memorandum in connection with some of the answers that Weiss gave?

A. No, sir.

Q. Let me ask you this: Was Mendy Weiss asked his age? A. Yes, sir. 10484

Q. Did you then say something to Mendy Weiss? A. Yes, sir.

Q. What did you say? A. I said, "Why don't you stop lying and tell the man the truth?"

Mr. Talley: I move to strike that out and I ask your Honor to instruct the jury to disregard it.

The Court: Strike it out. The jury will disregard it. It is on the borderline, Mr. Turkus.

10485

Q. Did you say something on top of that?

Mr. Talley: I object to that as too general, indefinite, and not proper rebuttal. This witness is called in rebuttal.

The Court: Objection overruled.

Mr. Talley: Exception.

A. I don't remember, Mr. Turkus.

Q. When I asked him his address, and he stated he lived at No. 10 Monroe Street, New York City, you said something which the Court

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has stricken out. You cannot repeat that. Did you say something afterwards to him?

Mr. Talley: I object to that as not proper rebuttal.

Mr. Turkus: Specifically bringing your attention to the address.

The Court: Objection overruled.

Mr. Talley: Exception.

10487 A. I said, "Why don't you tell him your correct address is 4520 Twelfth Avenue, Brooklyn?"

Mr. Talley: I object to that and move the answer be stricken out as not responsive.

The Court: Objection overruled, motion denied.

Mr. Talley: Exception.

The Witness: (continuing) He turned around to you and he said, "Why don't you ask him all the questions? He knows all the answers."

10488

Q. Did you state at the time you furnished the address, 4520 Twelfth Avenue, under what name this defendant was living?

Mr. Talley: Objected to as not proper rebuttal.

A. I did.

Q. What did you say to him about his name?

Mr. Talley: I take an exception to the last ruling.

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10489

The Court: How is this rebuttal?

Mr. Turkus: It is preliminary to what went on—

Mr. Talley: It should not have been asked at all; if it is not rebuttal we cannot have a preliminary of what is going on. The detective is told what he did. I take an exception.

The Court: Objection overruled.

Mr. Talley: Exception.

10490

Q. What did you say to him about his name?

A. I said, "Isn't it a fact you and your wife are living there under the name of Joseph Newman, in Apartment 5-C?" and it was then he turned around to you and said, "Why are you asking me questions? Ask him, he knows all the answers."

Q. By "him," he was referring to you, Detective Malone? A. Yes, sir.

Q. Was he asked where he worked?

Mr. Talley: I object to that as leading and not proper rebuttal—

10491

The Court: How is this rebuttal?

Mr. Turkus: I will come right to the point. That was just a preliminary question.

Q. At the time this defendant Mendy Weiss was being questioned, did he have certain documents and papers in his possession? A. He did.

Q. First, where did you apprehend him?

Mr. Talley: Objected to as incompetent,

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immaterial and irrelevant, not proper rebuttal.

The Court: Objection overruled.

Mr. Talley: Exception.

A. He was driving a 1940 Chevrolet coupe, license 3 L 1108, N. Y. It was registered as Abraham Lorber's, alias Little Yiddle, of 128 Marcy Avenue, Brooklyn—outside of 4520 Twelfth Avenue, Brooklyn.

10493

Q. In the District Attorney's office did you see the registration certificate for 3 L 1108, and did that come from the possession of the defendant Mendy Weiss?

Mr. Talley: Objected to as not proper rebuttal.

The Court: How is this rebuttal?

Mr. Turkus: As your Honor will remember, the testimony in connection with Lorber—

The Court: Come down to that.

10494

Mr. Turkus: The name of Lorber has been linked up, and I am showing that at the time he was brought to the District Attorney's office he was driving this man's car and had Little Yiddle's license with him.

The Court: That is part of your main case.

Mr. Turkus: There was no opportunity to develop that until the defense.

Mr. Talley: There is no foundation for that.

The Court: Point out where in the defense the foundation was laid.

Mr. Turkus: Association by defense witnesses with this Little Yiddle.

The Court: Their admission—I took it by way of collateral impeachment, to show he was known mutually by them and by the defendant Weiss.

Mr. Turkus: That is not collateral impeachment.

The Court: Under what theory is it offered?

Mr. Turkus: That I have the right now, in view of the testimony of Kleinman, to show the date when Emanuel (Mendy) Weiss was brought into the District Attorney's office, which has now been established as of March 28, 1940; and further facts in connection with the search by this detective for Emanuel Weiss at a certain time when he received a command and order to find him; that a subsequent search was made, which I will bring out from this witness. I want to show what papers he had in his possession and also show what search was made for his whereabouts. This goes on the theory of flight.

10496

10497

Mr. Talley: I move to strike out the statement of the District Attorney unless you instruct the jury they are not to take that in evidence, that it is simply a statement he makes, which is of no value to them.

The Court: I am trying to figure out what is a rebuttal and what is really an attempt to reopen the case. Frankly, I don't understand how this is rebuttal.

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Mr. Turkus: Then I move to reopen the People's case for the purpose of this testimony.

The Court: Why wasn't it offered before?

Mr. Turkus: Because I did not see any legitimate opportunity before this defense to offer it. At any rate, I now move to reopen the People's case for this testimony.

10499

Mr. Talley: That was all available before; he had five weeks to put in all the evidence.

Mr. Turkus: Kleinman's testimony opened my eyes to something they put in the record.

The Court: Kleinman's testimony did not amount to anything.

Mr. Turkus: I know that, but I know what will be done in summation.

10500

The Court: In that respect, the Court ruled that out—in that respect—but Kleinman's testimony stands in relation to the value, if any, of the fact that Police Commissioner Valentine allegedly, sometime in the latter part of April, happened to be several tables away, in Peter Luger's, eating a steak, when Mr. Kleinman and Mr. Weiss went in to eat at another table. There is no evidence there that Police Commissioner Valentine either knew Weiss or was aware of his presence, or if Weiss at that time was even suspected of the Rosen murder, because there is testimony by another witness—which is preliminary

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10501

to the alleged flight of Weiss—that at a subsequent time Weiss said that Tannenbaum was squawking, or words to that effect, and he would have to lam, or words to that effect. The remarks in the District Attorney's office in March were considered by the Court to be incompetent, immaterial and irrelevant at the time it was offered by the defense, and the same rule applies to you.

Mr. Turkus: I wanted to fix the date. Mr. Kleinman said he was hazy on the date, and I want to show he was brought in on March 28, 1940.

10502

The Court: You have that.

Mr. Turkus: Then your Honor precludes me from offering any evidence as to what Mendy Weiss had in his possession?

The Court: Yes, I think it had admittedly nothing to do with the Rosen murder. If the inference I draw is correct, Tannenbaum was, according to Weiss's statement, the one who started this, and that was at a later date.

10503

Mr. Turkus: At any rate, I fix the date of his appearance in the District Attorney's office. As to what documents he had in his possession, I am not permitted to go forward on?

The Court: No, sir. You are not. That ends that.

Mr. Talley: I ask your Honor to strike out the testimony of this witness in its entirety as not proper rebuttal.

The Court: The date may remain, and

10504 *James P. Malone—Rebuttal for People—Direct*

also the correction of testimony as to residence, although that is really a matter that may be argued as discretionary.

Mr. Talley: I ask your Honor to instruct the jury to disregard the testimony of this witness except the date.

The Court: The date and the correction of residence.

Mr. Turkus: What about traveling in Yiddle's automobile?

10505

Mr. Talley: That is immaterial and not rebuttal.

The Court: Sustained as to that. The jury will disregard it; it makes no difference.

By Mr. Turkus:

Q. On April 30, 1940, or thereabouts, did you pursuant to a command and instructions, look for the defendant Mendy Weiss?

10506

Mr. Talley: Objected to as not proper rebuttal; incompetent, immaterial and irrelevant.

The Court: This goes to the question of flight; this is different. I will let him testify to that.

Mr. Talley: Exception to your Honor's ruling.

A. Yes, sir.

Q. Where did you look for him? A. In the vicinity of the Federal Court on Foley Square, Manhattan.

Q. Did you find him there? A. No, sir.

James P. Malone—Rebuttal for People—Direct 10507

Q. Did you look other places on the East Side? A. Yes, sir.

Q. You had made the acquaintance of Mendy Weiss before March 28, 1940, hadn't you?

Mr. Talley: Objected to as not proper rebuttal.

A. Yes, sir.

Mr. Talley: Just a minute. When I object, you know enough to wait. 10508

Mr. Turkus: This is based on the search he made for him.

The Court: Being able to know his man?

Mr. Turkus: Yes.

The Court: Objection overruled

Mr. Talley: Exception.

Q. Where did you search for him?

Mr. Talley: Objected to.

The Court: Overruled.

Mr. Talley: Exception. 10509

A. In the vicinity of the Federal Court Building at Foley Square, in Manhattan.

Q. And subsequently, where did you look for him?

Mr. Talley: Same objection.

The Court: Objection overruled.

Mr. Talley: Exception.

A. Different parts of the East Side; the lower East Side of Manhattan.

10510 *James P. Malone—Rebuttal for People—Direct*

Mr. Turkus: I ask that this card be marked for identification.

(Received and marked People's Exhibit Z-35 for identification.)

Q. When Mendy Weiss was being questioned in the District Attorney's office in Brooklyn on March 28, 1940, was People's Exhibit Z-35 for identification produced by him from his person and taken by the Assistant District Attorney?

10511

Mr. Talley: Objected to as not proper rebuttal.

The Court: Objection overruled. Answer yes or no.

The Witness: If your Honor will permit me to refer to my notes that I have in reference to it—

The Court: Yes.

A. Yes, sir.

10512

Mr. Turkus: It is offered in evidence.

Mr. Talley: I object to it, if your Honor pleases, being incompetent, irrelevant and immaterial, and I ask that the sheets that have just been referred to be marked for identification. Objection is made on the further ground it is not proper rebuttal.

The Court: Mark the sheets for identification.

Mr. Talley: I would like to see them, if your Honor pleases.

The Court: Yes.

James P. Malone—Rebuttal for People—Direct 10513

Mr. Talley: Let me have them all.

The Witness: That was the sheet I referred to.

Mr. Turkus: There may be some other police information regarding someone else. He said that is the sheet he referred to.

The Court: Do you object?

Mr. Turkus: I do object.

The Court: Sustained.

Mr. Turkus: The one sheet he referred to, I have no objection to.

10514

Mr. Talley: Exception. He looked at all the sheets.

The Witness: I beg pardon, I had to look through my sheets. I had to look for that particular sheet that was at the end of these. However, what is in here, the records on these sheets, relate to the defendant Weiss.

The Court: Let Judge Talley see the card.

Mr. Talley: I object to the admission of the card in evidence.

The Court: Sustained.

10515

(Paper marked People's Exhibit Z-36 for identification.)

Q. Between March 28, 1940, the time when you brought Mendy Weiss to the Brooklyn District Attorney's office, until you saw him in court on this case, did you see him on any other occasions?

Mr. Talley: That is objected to as incompetent, irrelevant and immaterial, not

10516 *James P. Malone—Rebuttal for People—Cross*

proper rebuttal. This witness might have been anywhere during that period. The fact that he did not see him means exactly nothing.

The Court: Sustained.

Mr. Turkus: That is all.

Cross-examination by Mr. Talley:

10517 Q. Malone, you are connected with the Grand Jury in New York County, aren't you? A. Yes, sir.

Q. And you are working under the directions of District Attorney Dewey? A. Yes, sir.

Q. And you were in 1940? A. I beg pardon?

Q. And you were in April, 1940? A. Yes, sir.

Q. And you looked for Mendy Weiss in the vicinity of the Federal Court House over in the Borough of Manhattan, didn't you? A. Yes, sir.

Q. Was that at the direction of someone connected with District Attorney Dewey's office?

A. That I looked for him in that vicinity? No, sir.

10518 Q. Whose direction was that at? A. Just my own initiative.

Q. Your own initiative? A. Yes, sir.

Q. On your own initiative did you learn that he was due or expected to be at the Federal Court on that day, March 28th? A. March the 30th.

Mr. Turkus: That is the wrong date. I object to it.

Q. April 30th? A. Now between—

James P. Malone—Rebuttal for People—Cross

10519

Q. Will you answer my question? Did you hear it? A. I am trying to do the best I can.

Q. Did you hear the question? A. Will you read it?

(Pending question read.)

A. Not on that particular day but I am saying around that day.

Q. When you went there on the 30th day of April, didn't you learn that he had been there? Weren't you told that? A. No, sir.

10520

Q. You were not told? A. I beg pardon?

Q. Weren't you told that he was there in that court that day? A. No, sir.

Q. Did you ask the clerk of the court about it? A. Yes, sir.

Q. Didn't he tell you that he had been there?

A. No, sir.

Q. Why did you go there in the first place?

Mr. Turkus: That is a "why" question.

10521

A. That is a question that is pretty hard to answer without upsetting things.

Mr. Turkus: It is a "why" question. He invited the answer.

Q. You were told—

Mr. Turkus: Just a minute. There is a "why" question pending.

A. If you want me to answer the question the way it should be answered, Mr. Talley, I will.

Q. Just answer this question—

10522 *James P. Malone—Rebuttal for People—Redirect*

Mr. Turkus: There is a "why" question pending.

Mr. Talley: I have withdrawn it because you got so excited about it.

Mr. Turkus: It is a good thing I did.

Q. Were you told he was in the Federal Court Building or to be in the Federal Court Building on that day? A. I sat around that particular day, Mr. Talley, and I am pretty sure it was April 30th.

10523

Q. April 30th is the day you stated. You are not certain about it? A. There was several days he was due.

Q. You only told us one day, the 30th. A. I was not asked that.

Q. That was set out by the District Attorney. A. You specified one day.

Q. Were you there on the 30th? A. I was.

Q. Are you sure you were there on April 30th? A. Yes, sir.

10524

Mr. Talley: No further questions.

Redirect examination by Mr. Turkus:

Q. Are you sure it was March 28th, 1940, that you brought him to the Brooklyn D. A.'s office? A. Yes, sir.

Mr. Turkus: That is all. Detective Whalen.

John J. Whalen—Rebuttal for People—Direct

10525

JOHN J. WHALEN, shield No. 1746, attached to the Grand Jury Squad, Manhattan, called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. Turkus:

Q. Detective Whalen, are you a police officer employed in the Police Department of the City of New York? A. Yes, sir.

Q. How many years have you been attached to the Police Department? A. I was appointed April 1st, 1932.

10526

Q. And how many years have you been a detective? A. Since August 5th, 1935.

Q. On March 25th, 1940, what was your command or assignment? A. Acting Captain Bernard Dowd of the Main Office ordered Detective James Malone and I to apprehend Mendy Weiss.

Q. In pursuance of that command or direction, on March 25th, 1940, did you execute that command on the 28th day of March, 1940?

10527

Mr. Talley: Objected to upon the ground that it is not proper rebuttal.

The Court: Sustained.

Mr. Turkus: The date is of great importance.

Mr. Talley: It is not proper rebuttal.

Mr. Turkus: It is rebuttal of Kleinman's testimony who did not know the date he was in District Attorney O'Dwyer's office. That date was very significant in this case. Will your Honor read that testimony of Kleinman if there is any doubt about it?

10528 *John J. Whalen—Rebuttal for People—Direct*

Mr. Talley: Your Honor said there was nothing in Kleinman's testimony at all that called for rebuttal.

Mr. Turkus: Then why be alarmed about it?

Mr. Talley: I am not alarmed at all but I want to keep this trial with some degree of regularity.

Mr. Turkus: So I noticed, with your request for the adjournment.

10529 Mr. Talley: Is that what you said?

Mr. Turkus: What else do you call it when you want to go down to Florida?

Mr. Talley: I told you it was an attempt to make up your failure to give me the papers that were demanded months ago.

Mr. Turkus: Sit down.

Mr. Talley: Don't tell me to sit down.

Mr. Turkus: If you want to stand up, I will sit down.

The Court: Sustained.

10530 Q. Did you take the defendant Mendy Weiss to the office of District Attorney O'Dwyer on March 28, 1940?

Mr. Talley: Objected to as not proper rebuttal.

The Court: Overruled on that.

Mr. Talley: Exception.

A. Yes, sir.

Q. When you brought Weiss into the office of District Attorney O'Dwyer, did you see Assistant District Attorney Turkus? A. Yes, sir.

Q. When you saw him, was there someone with him? A. Yes, sir.

John J. Whalen—Rebuttal for People—Direct 10531

Q. Who was that person with him? A. William Kleinman.

Q. Did you know William Kleinman from before? A. Yes, sir.

Q. Where did you know him from?

Mr. Talley: Objected to, if your Honor pleases, quite unnecessary.

Mr. Climenko: I object to this, if your Honor pleases, as improper, incompetent, and not proper rebuttal.

Mr. Turkus: This is the identity of Kleinman.

Mr. Talley: He says he knows Kleinman. That is sufficient for his identity.

Mr. Climenko: I have a separate objection to the specific question.

The Court: Sustained.

Q. Was it William W. Kleinman? A. It was William Kleinman.

Q. You don't know about the "W"? A. No, sir.

Q. Did you see William Kleinman do anything when the defendant Mendy Weiss was brought into the D. A.'s office and did you hear him say anything?

Mr. Talley: Object to it, not proper rebuttal.

The Court: Overruled.

Mr. Talley: Exception.

A. Yes, sir.

Q. What did you see him do and what did you hear him say?

10532

10533

10534 *John J. Whalen—Rebuttal for People—Direct*

Mr. Talley: Same objection, sir.

The Court: Overruled.

Mr. Talley: Exception.

A. When I entered the office—

Mr. Talley: Just answer the question, will you, please? What did he say or do?

10535 A. (Continued) —he rose. He was seated on the left-hand side. He was seated on a green sofa and he rose and he greeted Mr. Weiss and he said, "I have been retained by your brother Murray. If you want me you know where to get me."

Mr. Talley: I move to strike it out as not proper rebuttal.

10536 The Court: The only way that I can figure it can come in on rebuttal is, Mr. Kleinman testified that while he did not remember the exact date of the meeting at Luger's that it was several weeks after the meeting in Mr. Turkus' office. Now, in the absence of any evidence that Commissioner Valentine knew Weiss, noticed that he was there at a nearby table or several tables away, knew that he was wanted for something which does not appear by the record of this case to have been in Commissioner Valentine's mind or that of his associates, I don't see how this is relevant.

Mr. Turkus: Your Honor has missed the point I am trying to make. The vitally important thing is the date that this de-

fendant Mendy Weiss was in the District Attorney's office, as fixing it as March 28, 1940. The purpose of identifying Kleinman and having Kleinman and Weiss together is to show that that was the one incident that Kleinman spoke about concerning which his memory was hazy.

The Court: Why is the date of any importance whatever?

Mr. Turkus: When we get to the jury on that I will explain it. I am going to meet with a roar of objections if I discuss it now in front of the jury. The date is vitally important.

10538

The Court: I am going to let it stand because it is not prejudicial, even though I don't see the point at this time. Objection is overruled.

Mr. Talley: I take an exception to your Honor's ruling.

Q. Did Kleinman then shake hands with Mendy Weiss and depart from the District Attorney's office? A. Yes, sir.

10539

Q. Between that day, March 28, 1940, and until you saw Mendy Weiss in this court-room, have you seen him?

Mr. Talley: Objected to as incompetent, irrelevant and immaterial.

The Court: I will take it although I don't see what it means.

Mr. Talley: Exception.

A. No, sir.

Q. Do you work with Whalen as partners? A. My name is Whalen.

10540 *John J. Whalen—Rebuttal for People—Cross*

Q. Pardon me, with Malone? A. Well, we did at that time.

Q. On April 30, 1940, did you look for Mendy Weiss? A. Yes, sir.

Q. And subsequent thereto did you look for him? A. Yes, sir.

Q. Where did you look subsequent to April 30, 1940?

10541 Mr. Talley: Objected to, incompetent, irrelevant and immaterial, not proper rebuttal. It certainly is not proper rebuttal.

The Court: I am trying to figure out how it can be rebuttal.

Mr. Turkus: If there is any doubt about it, I won't press the question. Your witness.

The Court: You have your evidence in already about the Western trip?

Mr. Turkus: Yes, your Honor.

The Court: Covering a period of several months and about the alleged threat—

10542 Mr. Turkus: I won't press it, your Honor.

The Court: To "lam" on account of Tannenbaum having talked about the Rosen case.

Mr. Turkus: Yes, sir. The witness is offered for cross-examination.

Cross-examination by Mr. Talley:

Q. Whalen, were you alone what police call "the arresting officer"?

Mr. Turkus: I object to that.

The Court: In what case?

Mr. Turkus: I don't know what he is talking about.

Mr. Talley: Of course, in this case, referring to March 27th and March 28th, the case he has just been testifying about under the leading of the District Attorney. What other case could it be?

Mr. Turkus: I don't know. You ask me questions? I don't understand you sometimes.

Mr. Talley: Well, you don't understand English if you can't understand my questions which are pretty plain.

The Court: No, but both sides have discussed collateral matter in connection with Weiss. It is dangerous ground. Sustained.

Mr. Talley: Exception.

10544

Q. You state that you arrested—you and Malone arrested Weiss on March 28th? A. We took him into custody.

Q. You did not arrest him? A. Well, yes, you can call it an arrest because he was deprived of his liberty.

10545

Q. Where did you take him when you first laid hands on him? Where did you take him? A. 156 Greenwich Street.

Q. What is that, the Greenwich Street police station? A. Yes, sir.

Q. What is the number of the precinct? A. Second.

Q. You did not book him in that station house that night as a prisoner at all, did you? A. No, sir.

10546

John J. Whalen—Rebuttal for People—Cross

Q. You kept him there overnight? A. Yes, sir.

Q. You had no warrant for his arrest, did you, officer? A. No, sir.

Q. You just took him, put him in a cell, put him in jail, and there was not any charge pending against him, was there? A. He was not placed in any cell, sir.

Q. There was not any charge pending against him, was there? A. No, sir.

10547

Q. And the next day you say you brought him over, which would be March 28th according to your testimony, you brought him over to see Mr. Turkus in the District Attorney's office in Brooklyn; is that right? A. That is correct.

Q. Then that day he was released from custody, wasn't he? A. Yes, sir.

Q. What? A. Yes, sir.

Q. How long were you in his presence from the time you arrested him, which would be the 27th, wasn't it? A. No, it was on the 28th, at about one o'clock or one-thirty in the morning.

10548

Q. One o'clock in the morning. That is pretty close to the 27th. An hour after midnight on the 28th you took him into custody, as you say? A. Yes, sir.

Q. Then he was kept in the Greenwich Street police station until you brought him over to the District Attorney's office? A. That is correct.

Q. And then he was released. My question is what time was he released? A. Well, Jimmy and I left the D. A.'s office at half past three in the afternoon on the 28th day of March and we surrendered the defendant Weiss to a patrolman named Bronstein.

Q. When you say "Jimmy" you mean Jimmy Malone? A. Yes, sir.

John J. Whalen—Rebuttal for People—Redirect 10549

Q. The last witness who was on the stand before you? A. Yes, sir.

Q. But you know that Weiss was discharged from custody, don't you? A. Yes, sir.

Mr. Talley: I have no further questions of this officer.

Redirect examination by Mr. Turkus:

Q. Detective Whalen, when you left the D.A.'s office, Weiss was still there? A. Yes, sir.

10550

Q. In Greenwich Street, what room was he kept in before he was brought over to the D.A.'s office? A. It is on the second floor and our office is known as the Bureau of Criminal Information.

Mr. Turkus: That is all. Any further cross-examination?

Mr. Climenko: No cross.

Mr. Talley: If your Honor pleases, I move to strike out the testimony of Detective Malone and Detective Whalen, the last two witnesses who appeared, upon the ground that it is highly prejudicial; it is incompetent, irrelevant and immaterial, and not proper rebuttal.

10551

The Court: Denied.

Mr. Talley: It has to do with an arrest, taking into custody, and should be stricken out and the jury should be instructed to disregard it. I take an exception to your Honor's ruling.

The Court: I instruct the jury as to

10552

Vance Newman—Rebuttal for People—Direct

both of these witnesses not to be prejudiced by the fact of Weiss being allegedly in the statica house for the purpose of being questioned. That could happen to anybody and it does not discredit anybody to have it done.

Mr. Turkus: The only purpose of the offer was to fix the date.

10553

The Court: Yes, but Judge Talley called attention to something that I thought required special instruction to the jury.

Mr. Turkus: That is something he brought out himself on cross-examination.

VANCE NEWMAN, residing at 55 Pierrepont Street, Brooklyn, N. Y., called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

10554

Direct examination by Mr. Turkus:

Q. By whom are you employed? A. United States Government, Treasury Department, Bureau of Narcotics.

Q. And how many years have you been in the employ of the United States Government? A. Nearly five years.

Q. And how many years have you been with the Narcotic Division? A. Nearly five years.

Q. I show you People's Exhibit Z-26 for identification, and ask you if you have seen that photograph before (handing photograph to witness)? A. Yes, sir, I have.

Vance Newman—Rebuttal for People—Direct

10555

Q. Where did you find it? A. In the Weiss apartment at 10 Monroe Street, New York. New York.

Mr. Talley: I object to it, if your Honor pleases, not proper rebuttal. Move to have the answer stricken.

The Court: I do not know whether it is or not yet. Denied at this time.

Mr. Talley: Exception.

Q. On what date did you find that photograph, People's Exhibit Z-26 for identification? A. August 26, 1940.

10556

Mr. Talley: I object to it, if your Honor pleases, on the same grounds.

By the Court:

Q. Weiss apartment at where? A. 10 Monroe Street, Manhattan.

Q. What date? A. August 26, 1940.

The Court: Denied at this time.

Mr. Talley: This is certainly on a collateral matter, if there is such a thing in this case.

The Court: I cannot tell.

Mr. Turkus: This is corroborative of the cross where the picture came from.

Mr. Climenko: If your Honor pleases, in view of Mr. Turkus' statement, may I have a general exception to this line of testimony now being elicited from this witness?

10557

10558 *Vance Newman—Rebuttal for People—Direct*

The Court: Yes, but I don't know what it is all about. I will rule at the proper time.

By Mr. Turkus:

Q. Where, in the Weiss apartment, did you find People's Exhibit Z-26 for identification? A. In a sort of a writing desk.

10559

Mr. Talley: Same objection.

Q. Was it among other photographs and papers? A. Yes, sir.

Q. Did you take that photograph with you? A. Yes, sir.

Q. Is that photograph in the same condition now as it was the day you found it under the circumstances related? A. Yes, sir.

Q. To whom did you turn over possession of that photograph? A. I showed it to the District Supervisor in our office and put it in the files of the office.

10560

Q. Have you seen Agent Greenfeld outside in the corridor? A. Yes, sir, he is out in the hall.

Q. Who was present at the time that you found that photograph? A. Agent Irwin Greenfeld and Agent George Miller.

Q. Were any of the Weisses present? A. Mrs. Weiss was present.

The Court: What Weiss apartment? There are lots of Weisses.

Mr. Talley: This is Sidney Weiss' apartment.

Mr. Turkus: The Sammy Weiss apartment.

The Court: Is this the celebrated photograph?

Mr. Turkus: Yes, your Honor.

The Court: So there won't be any time wasted on that, the Court does not consider the possession or taking of that photograph as impeaching the credibility. The only condition under which it could be received in evidence would be from the sale of it, commercializing. It has nothing to do with truth or falsity as a habit of the person who may have it.

10562

Mr. Turkus: No further questions.

Mr. Talley: I move to strike out the evidence of this witness.

The Court: Strike it out.

Mr. Talley: And ask the jury to disregard it.

The Court: Disregard it. I know the photograph.

Mr. Turkus: The People rest.

The Court: Too far fetched.

Mr. Turkus: Do you know whose picture that is?

10563

The Court: I do.

Mr. Turkus: The People of the State of New York rest the case.

The Court: Let me see it again, to make sure that it is the photograph I referred to. I said "celebrated". Yes, that is the one I mean. That does not edify the jury.

Gentlemen, supposing you make your motions. I will excuse the jury for motions. (To jury) Do not discuss the case.

10564

Colloquy

Then you can make the motions in the order in which the names appear on the indictment.

Mr. Talley: May I make a suggestion we take a recess now until one-thirty, whatever our time is, and make the motions then? It is merely a suggestion.

10565

The Court: May I suggest this: In so long a trial, the Court is not going to squeeze counsel into rushing into summations. That may result in confusion. You are entitled to sensible pause to get your thoughts properly assembled on the summations. You are entitled to this afternoon for that. Before excusing the jury, suppose we have an understanding that summations begin tomorrow morning at ten o'clock; first, someone on behalf of the defendant Buchalter; then someone on behalf of the defendant Weiss; then someone on behalf of the defendant Capone, in the event of the motions being denied. So you will understand just where you are at, the Court's disposition is not to limit time for summations but to leave it to the discretion of each counsel, one counsel summing up for each defendant, but I will appreciate if you can give me a fair estimate as to what each of you think will be the time consumed so that I will know just about when to be prepared to make the charge. Who sums up on behalf of Buchalter?

10566

Mr. Climenko: Your Honor, that will be done by Mr. Barshay. He is not in this room at this moment. He is only a moment away from this room.

The Court: Has he stated how long he will take?

Mr. Climenko: I think that approximately should be made by him. I will have it for you in a moment.

Colloquy

10567

The Court: Judge Talley, how long will you take? You are not bound by this.

Mr. Talley: I know, but before I make my reply to you, the thought occurs to me if counsel are ready to make the motions, why not let—

The Court: I was going to let the jury go out to lunch and then directly back to where they are staying.

Mr. Talley: I will say about two hours at the outside would be sufficient.

The Court: How about the defendant Capone?

10568

Mr. Rosenthal: I imagine about three hours or two and a half hours.

The Court: And how about the District Attorney?

Mr. Turkus: I assume that I will have about six hours to answer of debate. I think I can conclude in an hour or an hour and a half. I will make it as rapid as I can.

The Court: There is going to be no pressure. If you start to press things in your summation, with the evidence in this complicated situation, it will tend to confuse the jury. Clarity must be sought for and plenty of time is essential for that. There will be a decent pause between each summation so that the jury won't get intellectual indigestion.

10569

Mr. Rosenthal: Might I add, your Honor, so that the summation can be intelligent, whether in making our motion in respect to the limitation of testimony in respect to certain people, whether we can have your Honor's ruling on that and then we will know just what is supposed to apply to each particular client.

The Court: You won't have to go into it as finely as that just now.

10570

Colloquy

The jury are excused until tomorrow morning at ten o'clock. Gentlemen, please do not discuss the case, let nobody talk to you about it. Keep your minds open and follow all other admonitions heretofore given, including those which are on the typewritten paper with captain of the court officers.

Mr. Turkus: Your Honor, there is one paper that I wanted marked for identification that I neglected, before the motions are made.

10571

The Court: Mark it.

(Two papers (affidavits) marked People's Exhibit Z-37 for identification.)

The Court: The jury may go now.

(The jury retired from the court-room.)

The Court: Now, motions for defendant Buchalter.

10572

Mr. Climenko: Before I begin that, for your Honor's information and merely by way of approximation, the summation of defendant Buchalter will take about three to four hours.

The Court: Counselor, when I was practicing law I formed an impression which still persists, that a lawyer who knows his business should not be crowded in summation; he should be permitted to argue his case fully, whether it is tiresome or not. That is up to him.

Mr. Climenko: I have just been given that approximation.

The Court: Frequently I have resented being curtailed in the time which I thought was

*Motion to Dismiss Indictment against Defendant
Buchalter*

10573

necessary for a proper argument of the cause that I represented. As a Judge I have always given that courtesy to the lawyers who tried cases before me.

Mr. Climenko: We certainly appreciate that in this case, your Honor, and I know that your Honor will realize that we devoted hours in an effort to condense it.

If your Honor pleases, at this time the defendant Buchalter, at the close of the entire case, renews the motions made at the end of the People's case to dismiss the indictment upon the ground that the People failed to prove a prima facie case, for a directed verdict of acquittal upon the ground that the People failed to prove the guilt of that defendant beyond a reasonable doubt, and upon the further ground that no testimony was tendered against that defendant except through witnesses who are accomplices as a matter of law. That was the generic motion made by the defendant Buchalter at the end of the People's case and it is renewed at this time.

10574

Does your Honor desire me to make all of these motions seriatim or to await rulings after each has been made?

10575

The Court: That is denied.

Mr. Climenko: Exception. The defendant Buchalter moves to strike from the record all of the testimony of the witness Harold Rosen—and I may say that that testimony which I now will refer to appears at approximately pages 255 to 265 of the stenographer's minutes—that testimony being to the effect that that witness, Harold Rosen, was employed by the New York and New Jersey Clothing Transportation Com-

10576

*Motion on Behalf of Defendant Buchalter
to Strike Out*

pany, and all of his testimony as to the condition of that business during the period of his employment and within six months thereafter, upon the ground that it is remote, speculative, and not binding on the defendant Buchalter.

The Court: You mean that you wish to strike out Harold Rosen's testimony which purports to relate to the financial soundness of the business?

10577

Mr. Climenko: That is right, your Honor.

The Court: Strike it out.

Mr. Climenko: The defendant Buchalter moves to strike from the record the testimony of the witness Harold Rosen appearing approximately at pages 265 to 270 of the stenographer's minutes, dealing with the alleged meeting of the defendant Buchalter with the decedent Joseph Rosen, upon the ground that it is remote and upon the further ground that it is so speculative and uncertain that it should not be submitted for the consideration of the jury.

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The Court: This was a pantomime. The subject of discussion is not revealed but occurring on or about the month of April, that in relation to other parts of the record appears to be placed as on or about the time that Kelly withdrew. It may stand but there may be no speculation as to what was said. The Court will instruct the jury on that point. If it is overlooked, you may make a request at the proper time.

Mr. Climenko: At this point, your Honor, I deem it my duty to refer to my own recollection of the condition of the record which is in some contradiction with that of the Court. Your Honor says that this incident occurred about

*Motion on Behalf of Defendant Buchalter
to Strike Out*

10579

the time of the withdrawal of Kelly from that business. This record shows, in so far as it shows anything on that subject, that Kelly withdrew in April, specifically on April 27, 1932. No precise date is given by the People's witnesses for this alleged meeting but they agree, in so far as they fix it at all, that it occurred in the summer of 1932. I don't pretend that I know what significance your Honor's mind gives to that date but, since you referred to the date, there is that condition of the record.

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The Court: I will tell you because it was testified to, if I recall correctly, by Harold Rosen that about six months after this alleged pantomime his father withdrew from the business, and because his daughter testified that he withdrew from the business about September. Take six from nine, it leaves three. That is about April, close to it anyway.

Mr. Climenko: Before I leave that particular motion may I understand does your Honor grant it in substance?

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The Court: No, I am not striking it out. For what little it is worth it may remain in, but the jury will be properly instructed, I hope.

Mr. Climenko: Well, I reserve any exception. I don't want to take an exception to such a ruling.

The Court: All right, although in a capital case you do not have to take any exceptions.

Mr. Climenko: I had in mind the fact that your Honor's ruling will probably, as your Honor intimates, cover the matter properly. Therefore I don't want to note an exception at this time.

10582

*Motion on Behalf of Defendant Buchalter
to Strike Out*

The defendant Buchalter moves to strike from the record the testimony of this same witness, Harold Rosen, as it appears at page 271 of the record, to the effect that the business of that same corporation ended six months after the meeting alleged to have occurred at the Broadway Central Hotel, upon the ground that it is remote, speculative, and confessedly hearsay, and that it deals with an incident, even if it did occur, which is not binding on this defendant.

10583

The Court: I think that is dilatory. It should have been made when he was examined and cross-examined. Denied.

Mr. Climenko: Exception and exception to the Court's ruling that the motion as made now is dilatory.

The defendant Buchalter moves to strike from the record the testimony of this same witness, Harold Rosen, with respect to the efforts of his father to obtain employment after the severance of the decedent's association with that same corporation, and that is testimony which appears at page 272 of the stenographer's minutes, upon the ground that it is hearsay and that its non-dependability is established by other testimony elicited by the People.

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The Court: I did not even make note of it, attached no importance to it. Now I will turn to page 272. The Court sustained the objection to that. That is of no evidentiary value whatever. It is stricken, if there is anything to strike out.

Mr. Turkus: There is nothing there.

Mr. Climenko: The motion as made is granted?

The Court: That is just a decoy duck.

*Motion on Behalf of Defendant Buchalter
to Strike Out*

10585

Mr. Climenko: The point is, your Honor, he did make those statements.

The Court: It is of no value. It is stricken, if there is anything to strike out.

Mr. Climenko: Thank you.

I have only a few of these motions, your Honor, and I will be quick with them.

The defendant Buchalter moves to strike from the record the testimony of the witness Sylvia Greenspan, as it appears approximately from pages 357 to 379 of the record, dealing with the alleged meeting of the defendant Buchalter with the decedent Joseph Rosen at an unspecified time in the year 1932 and at an unspecified place, upon the ground that the incident, assuming that it did occur, is so remote from the crime alleged that the testimony ought not be submitted for the consideration of the jury.

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The Court: Denied.

Mr. Climenko: Exception.

The Court: The Court, in denying this, is not conceding the premises as just related.

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Mr. Climenko: Premises as what?

The Court: I am denying it because I know what is on the record, whether your conception of it or interpretation of it is correct or not.

Mr. Climenko: You mean my reference to an unspecified place?

The Court: Yes.

Mr. Climenko: I make no point of that and I don't ask the Court to adopt—

The Court: The time was fairly well designated as the summer. I think it was nailed down to July, at one place.

Mr. Climenko: I would not want to dispute

10588

*Motion on Behalf of Defendant Buchalter
to Strike Out*

the proposition that the time as specified is within the season.

The Court: The record is here. What is the use of talking about it? Denied.

Mr. Climenko: The defendant Buchalter moves to strike from the record all of the testimony of the witness Max Rubin to the effect that he was shot, upon the ground that by the hypothesis of the People's theory that testimony is not binding on the defendant Buchalter.

10589

The Court: His testimony that he was shot came in on his being subsequently called back, after proper basis had been laid and the chain of circumstances which made it competent being put on the record. Denied.

Mr. Climenko: Exception.

The Court: Its application, however, is a matter for the Court's charge.

Mr. Climenko: May I proceed, sir?

The Court: Is that all?

Mr. Climenko: That was all as to that. I just asked your Honor whether I might proceed.

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The Court: Yes, proceed.

Mr. Climenko: The defendant Buchalter moves to strike from the record all of the testimony of the witness Max Rubin to the effect that he left his home in or about October or November, 1936, and thereafter concealed himself in various places, upon the ground that it is not shown that he fled in consequence of a fear that he might be implicated in this case.

The Court: Denied.

Mr. Climenko: Exception.

The defendant Buchalter moves to strike from the record, or in the alternative requests the

*Motion on Behalf of Defendant Buchalter
to Strike Out*

10591

Court to instruct the jury as an alternative application here, that this testimony about to be referred to is not binding on the defendant Buchalter; that the testimony of the witness Berger with respect to the acts which he did and the statements which he made subsequent to June, 1937, the last date on which he said he saw the defendant Buchalter, is not binding on that defendant.

The Court: Denied.

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Mr. Climenko: Exception. As a constituent of that motion, the defendant Buchalter moves to strike from the record that portion of the testimony of the witness Berger in which he related his efforts to shoot or to assist in the shooting of the witness Rubin, as not binding on the defendant Buchalter.

The Court: Denied.

Mr. Climenko: Exception.

The Court: You understand in denying motions to strike out it is because the Court takes the view that it must either strike out for all purposes of the trial or leave in for the particular application that the evidence has. An application of each and every point of evidence as to specific defendants has to be carefully studied out by the Court in preparing its charge. That work is under process now. I am not in a position to state the application of each and every point of evidence at this time without the likelihood of error.

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Mr. Climenko: I understand that.

With respect to the testimony of the witness Magoon, if your Honor pleases, the defendant Buchalter moves to strike from the record that

10594

*Motion to Dismiss Indictment etc. against
Defendant Weiss*

portion of the testimony of that witness in which he said, in effect, that on an occasion in 1938 the defendant Capone said to him, "We must hit Rubin because he is hurting Lep," and upon the ground that that statement is as against the defendant Buchalter hearsay and inadmissible since it refers to a proposed act to be committed after the termination of the conspiracy to commit the crime charged in this indictment. The testimony that I refer to appears at pages 2346 and 2347.

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The Court: Denied.

Mr. Climenko: Exception.

As to the witness Maguire, the defendant Buchalter moves to strike his testimony in its entirety from this record upon the ground that it is not binding on the defendant Buchalter for the reason that there is no proof in this record that that witness Rubin was induced to flee this jurisdiction or did flee in consequence of fear that he might become involved in the investigation or prosecution of this case.

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The Court: Denied.

Mr. Climenko: Exception. That, if your Honor please, completes all the motions to be tendered on behalf of the defendant Buchalter.

Mr. Talley: If your Honor please, the following motions are made on behalf of the defendant Weiss. I renew all the motions made at the close of the People's case and ask that they be granted.

The Court: Denied. You might, if there is any special motion that I don't recall at this time, call my attention to it. I take it you refer to the usual motions that are made in these cases.

*Motion on Behalf of Defendant Weiss
to Strike Out*

10597

Mr. Talley: I renew all the motions made to strike out evidence, motions made during the course of the trial. They are now and here renewed. There are too many of them for your Honor to read now.

The Court: I would rather then you repeat them because I don't want to make an error on this ruling.

Mr. Talley: I am not prepared at this time to point out all of the motions to strike out the testimony that were made during the trial. I simply make this blanket motion.

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The Court: Do you recall this, whether or not there was any motion in which I temporarily made a ruling, that is, made a tentative ruling?

Mr. Talley: There were some, but I am unable to give them to you now. I expected there would be a little time intervene between the close of the case and making the motions. I have not had an opportunity to examine the record for them.

The Court: You can let me know later.

Mr. Talley: Yes, I will, if I can have that privilege.

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The Court: For the present it will be denied, subject to counsel having the right to call attention to specific matters and obtaining a revision of the ruling.

Mr. Talley: The Court will note my exception to the first motion and the denial thereof, made by me. Now you will note my exception to the ruling of the Court made on this second motion.

The third motion is, I move to strike out all the testimony given by Mrs. Rosen with respect to the identification, alleged identification, made

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*Motion on Behalf of Defendant Weiss
to Strike Out*

by her of the man who came into her shop on the night before the murder.

The Court: Granted.

Mr. Talley: Upon the ground it is too indefinite and too uncertain, and it is not of sufficient credible value to submit to a jury.

The Court: Granted.

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Mr. Talley: I move to strike out all the testimony of the witness Rabin upon the ground that it had no application in any form or manner to the defendant Weiss.

The Court: Denied.

Mr. Talley: Exception. I move to strike out all the testimony of the witness Magooa upon the same ground.

The Court: Denied.

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Mr. Talley: Exception. I move to strike out all evidence in this case as to flight as being subject to two interpretations, one an interpretation that would be favorable to the defendant, the other that might be unfavorable. There is no testimony in the case that any flight sought to be proved by the District Attorney was flight by the defendant Weiss from the Rosen killing, indictment, or fear of apprehension in connection with the Rosen case.

The Court: Denied.

Mr. Talley: And the jury must indulge in the more favorable inference to the defendant upon the presentation of that evidence.

The Court: There is sufficient evidence, in my judgment, to show that it was directly related to the Rosen killing. Denied.

Mr. Talley: Exception. May I just interpolate and say, has your Honor's view changed on that since you expressed it today? I under-

*Motion on Behalf of Defendant Weiss
to Strike Out*

10603

stood you yesterday to indicate very plainly that there was no evidence that the flight was from the Rosen killing or the Rosen indictment.

The Court: Will you refer me to the record on that point?

Mr. Talley: No, but I understood that was the statement you made.

The Court: I think you may be confused on that point.

Mr. Talley: It may be the day before.

The Court: Because last night, in reviewing the record in part, I made mental note of evidence that connected it with the Rosen killing.

Mr. Talley: I take an exception to your Honor's denial of my motion.

The Court: Pardon me. I am still trying to think of the basis for what you just said.

Mr. Talley: You used that expression—

The Court: Wait a minute, I can think better if you don't talk.

Mr. Talley: I don't know when you are finished speaking.

The Court: There was a comment made when Mrs. Weiss was testifying, wasn't there?

Mr. Talley: I cannot recollect who was on the stand.

The Court: No, it was when Sidney was on the stand.

Mr. Talley: But you did make that comment, that it was subject to two interpretations and that you would have to charge the jury, if it went to them, that they would have to indulge the favorable presumption to the defendant.

The Court: That was solely related to the basis of Sidney Weiss' testimony. It did not

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*Motion on Behalf of Defendant Weiss
to Strike Out*

relate to the rest of the record. The remark had that application only.

Mr. Talley: I take it your Honor denies my motion, and I note an exception to it.

I join in the motions, insofar as they apply to the defendant Weiss, made by counsel for defendant Buchalter, and the motions which are about to be made on behalf of the defendant Capone.

10607

The Court: They are all denied.

Mr. Talley: I move to strike out all evidence that has been introduced as to the—

Mr. Turkus: Capone's motions have not been made yet. He is trying to predicate a motion on motions that have not been made yet.

The Court: The same rulings that are made on the Capone motions will apply to all. The same exception will apply to all. I don't regard an exception in a capital case more than as an expression of disapproval to the Court for his ruling.

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Mr. Talley: Judge, it is not always safe to go up to the Court of Appeals and be asked, "Did you take an exception to that ruling?", and say, "No, I relied upon the theory I did not have to." The invariable ruling is, "You should have taken an exception."

The Court: In a capital case?

Mr. Talley: Yes, sir. They frequently take the view that the Court has the right—and I think they are right, too—I think the Court has a right to be advised of dissent of counsel on a ruling so that he may possibly reconsider it and be shown he was in the wrong.

The Court: I was not aware of that attitude, that policy.

*Motion on Behalf of Defendant Weiss
to Strike Out*

10609

Mr. Talley: It is true. I move to resume the business of the day.

I move to strike out all the evidence that has been presented on the so-called spoliation theory insofar as it is attempted to apply to the defendant Weiss.

The Court: I deny it at this time, and will charge the jury as to application of it to specific defendants at the proper time.

Mr. Talley: Exception. That is all my motions at the moment.

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Mr. Rosenthal: Before making my general motion, your Honor, I move to limit the testimony of Mrs. Rosen to defendants other than the defendant Capone. My purpose here in making my motions is to see whether the Court agrees with me as to the applicability of certain testimony to defendants other than whom I represent, before I predicate my final motions which I intend to make to your Honor. I now move to limit, knowing that it is testimony in the case, the testimony of Mrs. Rosen to defendants other than the defendant Capone—to defendant or defendants, I will put it that way—other than the defendant Capone.

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The Court: That is really a request to charge. That may be made at the proper time. Denied at this time.

Mr. Rosenthal: I then will, in general form, make the same motion as to Harold Rosen, Sylvia Greenspan, Edward Maguire, Albert E. Aman, Joseph Bell, James E. Ryan, Thomas J. Winne, and the three detectives who were called in rebuttal, or two detectives and one government agent called in rebuttal, as well as the witnesses Berger, Tannenbaum and Rubin.

10612 *Motion to Dismiss Indictment against Defendant
Capone*

The Court: Denied at this time. You may make the proper request to charge later, if the main charge of the Court is not satisfactory on those points.

10613 Mr. Rosenthal: Now, then, I respectfully move to dismiss the indictment and for the direction of a verdict of acquittal upon the grounds which I have previously urged at the time of the close of the People's case, and upon the further ground that it now affirmatively appears from the evidence that outside of the testimony of the accomplice, who is an accomplice as a matter of law, the only thing relied upon by the District Attorney in this case is an isolated statement alleged to have been made three or four years subsequent to the killing, in which the words, "I worked on the Rosen thing right on Sutter Avenue and I was not made. I hung around there, too," contained on page 2360 of the record.

10614 As I started to say before I quoted, the District Attorney relies upon this isolated statement to furnish the so-called corroboration insofar as it affects the defendant Capone. It is insufficient as a matter of law, I contend, and I renew the motions which I made at the close of the People's case and ask for a direction of a verdict of acquittal.

The Court: Motion denied.

Mr. Rosenthal: I respectfully except.

The Court: The jury will be properly instructed, I hope, on that point.

Mr. Rosenthal: I don't assume that your Honor wishes me to argue the insufficiency of a statement of that character before the submission of the fact of the guilt of the defendant

whom I represent to this jury. There is no time specified in it—

The Court: Mr. Rosenthal, the conditions under which the statement is made amplified it, show the pattern. What I have in mind is this, that on one occasion where there was nothing whatever in the case to connect a specific defendant with having committed the crime other than an alleged squad room admission that he was the one who committed the crime, and I granted a certificate of reasonable doubt as to the defendant's guilt after conviction upon the ground that as a matter of law there is reasonable doubt where the evidence is no more than that; the Appellate Division upon appeal unanimously upheld the verdict. That came to my attention a few days ago. That application was made to have me join in and give approval upon an application for clemency by that defendant who is now serving his term.

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Mr. Rosenthal: However, the People against Joyce, in the Court of Appeals, which is a capital case, where the rules probably are a little more stringently applied than they might be in a case where the sentence involved is that of only a few years of a man's life, where there was an absolute admission and where it subsequently came out that there was nothing corroborative of the admission, was reversed by the Court of Appeals and the indictment was subsequently dismissed. Here you have the word—

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The Court: You and I know that there are many reversals by the learned Court of Appeals which go right to the roots of essential justice in the particular case involved and which are

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Colloquy

not to be taken as a rigid guide in all other cases where the same point is presented purely as a matter of legal philosophy.

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Mr. Rosenthal: Excepting that in this case, sir, you have the arrest of this man Magoon, his failure to disclose, although he says he made a number of statements, until a year after his arrest, this alleged episode or incident; and then the episode or incident which he relates might mean anything, unless your Honor is going to permit the jury to speculate what the word "thing" means as related to Rosen, where there are episodes in this record which show a connection—an alleged connection, I should put it—insofar as other defendants are concerned, with Rosen as far back as 1932, as being the corroborative testimony which would warrant a jury in speculating the guilt of this defendant.

The Court: I have thought carefully on that point, in fact, I have thought a bit while lying awake nights during this trial. I am going to deny your motion.

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Mr. Rosenthal: And I am going to respectfully except.

The Court: All will remain seated while the defendants are remanded until tomorrow morning at ten o'clock.

Mr. Rosenthal: Judge, before the defendants leave, I want to put one other motion on the record.

The Court: I ² the defendants be seated. Let us have order.

Mr. Rosenthal: Throughout the trial I have renewed these motions made on behalf of the defendant Capone in line with the original motion

made prior to the commencement of the trial, for a severance, on the ground that the testimony adduced on this trial which does not affect him is of a nature which is prejudicial to his interest, and I now renew the motion and ask for the withdrawal of a juror and the declaration of a mistrial insofar as he is concerned on the ground that the state of the evidence is such it is impossible for him to procure on his own behalf a fair trial.

The Court: Denied.

Mr. Rosenthal: I respectfully except. Thank you.

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The Court: I will try to clarify the evidence so far as Capone is concerned to the utmost of my ability.

Mr. Rosenthal: I don't contend that your Honor is not going to be fair. I contend that the jurymen are men of limited intelligence, the same as all of us are, from various walks of life, and to ask men to be able to take out of their minds things which may prejudice them because of their happening is a hereculean task, which I think should not be left to any twelve human beings.

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The Court: Judges have to do that. A Judge sits in many a case knowing in advance that a man is guilty, but he does not show it.

Mr. Rosenthal: The Judge is trained in the law, sir.

The Court: This is a blue ribbon jury and it looks like a pretty intelligent one.

Mr. Rosenthal: I agree with you, they look very intelligent, but they are still human beings and we all have prejudices and likes and dislikes.

Mr. Talley: I have another motion, if you will hear me.

10624

Colloquy

The Court: Yes.

10625 Mr. Talley: I move for the declaration of a mistrial and the withdrawal of a juror upon the ground that the defendant Weiss has been so prejudiced that a fair and impartial trial is now impossible to him, by reason of the fact that the Assistant District Attorney, in opening this case, said he was going to prove that Rubin was shot at the direction and the instance of the defendant Weiss. Your Honor surely must recollect that, and no evidence in the case has been adduced to support that.

The Court: I don't, and if I may measure the jury's intelligence by my own, I assume the jury possibly falls in the same category, if that was in fact said. I don't think it is prejudicial at all.

Mr. Talley: How about the declaration by the District Attorney that the defendant Weiss is guilty of another attempted murder, another crime?

Mr. Turkus: Who said that?

10626 Mr. Talley: There is not any evidence to that effect in this record.

The Court: I do not even remember it.

Mr. Talley: I remember it very distinctly. He said Rubin was shot at the direction and instance of the defendant Weiss.

The Court: Motion is denied.

Mr. Talley: Exception.

The Court: Is that all?

Mr. Talley: That is all.

The Court: The defendants will be remanded.

(Thereupon an adjournment was taken to November 26, 1941, at 10:00 A. M.)

Summation on Behalf of Defendant Buchalter

10627

Proceedings, November 26, 1941.

(TRIAL RESUMED.)

The Court: Just a word of caution. Gentlemen, you will try to confine yourselves to the record—remember that at all times, and secondly, try to respect one another's rights to proceed without interruption.

Mr. Rosenthal: May we have an understanding that we reserve the right, so we are not considered dilatory, on anybody's summation, to the conclusion of the summation, to object to such portions as we may consider either inflammatory or not borne out by the evidence.

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The Court: I have only uttered a word of caution against squandering the right of interruption on matters that really do not need to be interrupted. If anything of sufficient importance arises, that really justifies an interruption of counsel, use discretion, but try to respect one another's rights, because no lawyer likes to be interrupted unless it is absolutely necessary. I think in any summation there are points of view in regard to evidence which we cannot agree on. The jury will have to figure that out.

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(Mr. Barshay then made his closing address to the jury in behalf of defendant Buchalter, as follows:)

With your Honor's permission, associate counsel, Mr. Turkus, Mr. Foreman, and gentlemen of the jury:

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Summation on Behalf of Defendant Buchalter

You can rest assured there is one thing in this case that the prosecution and the defense agree upon. That is, that the case is over and all are glad of it. I know it has been a hard and long and arduous fight, and I am reminded of the king who sent for his philosopher one day and said in one sentence: "You let me know what answer I should give to any problem that arises," and the philosopher said, "This is my sentence-- 'And this, too, shall pass away.' " I know there were times when all of us thought this case would never end, but it has, and no one is gladder than I am.

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There were a lot of unkind things said in this case. Well, maybe on the spur of the moment, gentlemen, things are said and things are done, but they really do not bear upon the issues in this case.

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I want to thank you, each and everyone of you, for surrendering your ordinary pursuits of life and making sacrifices. Your duty was plain to you and your sacrifices were plain to you—just like the soldier who has to sacrifice his pursuit in life in order to serve his country. You had to do that when you were chosen as jurors in this case. We have faith in your intelligence, in your honesty, in your courage, and we still have faith that you will do your job as gentlemen of intellect, without fear, without favor, without prejudice, without bias, without sympathy to any side on this case. I have faith that you shall go into this laboratory like scientists and there search for the truth. And you shall search for the truth in accordance with the law as his Honor will give it to you, and in accordance with the

Summation on Behalf of Defendant Buchalter

10633

facts which you have heard and believe from the witness stand. We did not oppose your choice as special jurors because it was our position that we needed men of intellect, so we have faith in you as jurors and I think one may be confident that, no matter what verdict you will have rendered, it is because you believe you have done your duty in the light in which each and every-one of you thought.

Now, you know, in choosing you, we asked you to consider the evidence in the case with respect to each defendant separately. It is difficult to do that in a long and arduous trial, but somehow I am sure you will. I asked you, in choosing you, to be independent—each one to be independent of the other. That was not with the intent of getting a hung jury, don't let that be said. I asked you to reason with your fellow jurors and talk to them, not to be obstinate in any way, to give your viewpoint, to listen to your fellow jurors' viewpoints, and to then come to a reasonable, sensible conclusion based upon the believable evidence in this case. I did not want in advance anybody to give you the idea that all we sought here was for the jury to disagree. I did not want that at all, and I do not want it now.

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I represent in this case only one defendant. I represent no group. I represent no combination. I represent no outside interests. I have no other client. I owe no duty to any single person outside of the defendant Buchalter. I represent him in no other matter but this one—in no other transaction but this one. I laid eyes upon him first when my associates in this case, the firm of Wegman and Climenko,

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Summation on Behalf of Defendant Buchalter

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retained me to assist them in the trial of this case. That was in June of 1941. I never tried, gentlemen, to give you the impression throughout the entire case here that I represented any angel. Do not be mistaken about that. I will speak about it as I go along. But it was not very long after I had been in the case and after I had commenced my investigation, together with my associates, for whose work I am very thankful, that I realized I was not only in the case but I represented a cause. I wanted to feel sure that every man, regardless of his reputation and his past life, could come into this court and feel that the scales of justice were equally poised. Every man is entitled to a fair and impartial trial by a jury of his peers, be he Buchalter or any other person, be he one of bad reputation or good reputation, be he white or colored, be he rich or poor, be he Protestant or Catholic, or Hebrew, be he male or female. In this court room everyone is entitled to equal justice. When I said I did not represent an angel, I meant just this: I condemn the defendant Buchalter's past life with as great vehemence as I possess. I am not in sympathy with his activities in the past—I condemn the vicious circle which contrived those people to domineer unions—the racketeers Weinstein and Katz. I condemn them with all the strength I have. It is they who prey upon innocent workmen in this city. I condemn the manufacturers and employers who did not complain to the authorities so that they could put an end to this vicious practice of preying upon labor. But they did not complain—not because they were afraid—because some of them hoped.

Summation on Behalf of Defendant Buchalter

10639

by yielding to the racketeers of the industry, that they would gain an economic or financial advantage over their competitors. I condemn every act of the defendant Buchalter's past life. His activities were in the Borough of Manhattan, but the diligent and energetic young Mr. Dewey had put finis for all time to those activities. I do not doubt that the defendant is where he belongs, but are we trying that issue? Are we trying him again? Are we trying his union activities? Are we trying the union? Are we trying the Weinstains, or the Katzes, or the Raleighs, or the Fields? We are not. We came here to try but one issue, a simple issue—did he or did he not commit the crime charged against him in this indictment. And yet—and yet—this murder, which occurred in 1936, was presented here with a preface and a prologue that commenced in 1917—ten years before. By all the evidence in this case, the defendant Buchalter even came near the Amalgamated union. Oh, I remember Mr. Turkus picked up the indictment when choosing you and saying, "We are trying the defendant Buchalter for the killing of Rosen, no more and no less." Yes, he said that. But, gentlemen, the trial was not on very many days before I realized that, in my opinion, he really did not mean, because if we tried the Rosen case, the latest we should have started was in the period of 1932. But, no, we have 1917, the organization of the Amalgamated, its make-up, its officers. I objected strenuously, and on cross-examination, when I tried to show the other side of the picture, there was the objection, "I object, this has nothing to do with the Rosen kill-

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ing." Do you remember that? Of course, it had nothing to do with the Rosen killing; it had nothing to do with it on direct, and it had nothing to do with it on cross. And if we had adhered to the issue of the Rosen killing here, this case would have been over within a period of two weeks. But we must have atmosphere in the case. Those things were presented to you because the District Attorney, in his mind, thought it would help him to sow a background of passion, and hatred and prejudice, and it was planted from the very inception. Sure, this union was domineered by racketeers, but that is not the issue. You heard about 1917—how they got into the union—who controlled it—how they ran strikes—how they profited. We had a background, a background that gave you a general insight as to what goes on every single day in your lives. While you may have heard of it, still you paid no attention to it. This is the background from which the District Attorney hopes some juror in this case would draw a prejudice in the direction of the defendant. You see, he did not create those conditions—they were there long before he came on the scene. There was Abie Slabow, Johnny Spanish, Terry Burns, and a whole lot of guerrillas and gangsters and strong-arm men who were present long before Buchalter came on the scene. He did not create it, but I have no sympathy for him, I do not apologize for him, because from 1927 he came in and profited by it—he was just as bad. But that is not the issue here.

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Immediately upon the trial of this case the defendant was referred to as "Lepke". Now,

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I don't care, gentlemen, really what name you refer to him by—I don't care at all. My idea of the meaning of "Lepke" is that it is a Jewish name for Louis, but to the unknowing, the name "Lepke" is an evil connotation; and maybe to you gentlemen who do not know the meaning of the word, it has an evil connotation like those started during the last war, when instead of referring to the German they referred to him as a "Hun". Yet, they refer to Buchalter as "Lepke". If the District Attorney thought that that would not help him, he never would have referred to him as "Lepke". What if he is called "Lepke"? What has that got to do with his guilt or innocence in this case? If you want to call him "Lepke", go ahead and call him "Lepke". But draw no evil inference from the use of that name.

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There was brought out in the opening of this case something to start you off with some inflammatory passion against the defendant—the shooting of Rubin. We objected to that. We are not on trial for that. But by the very opening you can see, gentlemen, that it has not even an application to the defendant Buchalter. This Rubin was shot—and I am not unsympathetic of his physical plight—somewhere in the County of New York where he was shot, there are men, honest men, who will do their duty at the proper time and see to it that those who are responsible for that act will be punished. At the head of the District Attorney's office in Bronx County there is a Mr. Foley, whose reputation is great. Let us not try his problem here—let us not do his work in this court—let that not stand in your

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deliberations of the guilt or innocence of the defendant Buchalter here. He had nothing to do with—it is no part of this case with respect to him. I shall let other counsel make mention of that fact, if it has anything at all to do with the respective interests of their clients.

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Oh, how simple this issue would have been had we stuck directly to the charge in the indictment, which was simply this: Buchalter, the Grand Jury accuse you of the shooting and killing of Rosen on September 13, 1936, by the means set forth in the indictment. The defendant said, "Not guilty", and when he said, "Not guilty," he meant he did not kill him—he had no reason to kill him—he did not participate in the killing—he got nobody else to do the killing—he was absolutely innocent of that charge. That is what the plea of "Not guilty" meant. It meant he denied each and every accusation set forth against him by the District Attorney. It meant that he had no motive to kill him, no reason to kill him. It meant that he denied

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every sentence, every accusation of Rubin. It meant he denied each and every allegation of Berger. It meant he denied each and every piece of testimony of Tannenbaum. It meant he denied he ever met Rosen at the Broadway Central Hotel in 1932. It meant he denied that there was any meeting on 19th Street where the "law was laid down" to Rosen. It meant that he denied that in the Raleigh office, in 1936, there was any talk with Rubin, with Tannenbaum present. It meant he denied he sent Mr. Rubin to get Mr. Berger. It meant he denied he went with Berger to get Weiss. It meant he de-

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nied he had any conference with Weiss at any time or at any place with respect to the shooting of Rosen. It meant he denied he had any talk in the presence of Tannenbaum three or four days later when he patted Weiss on the back. It meant he denied he induced Rubin to flee from this crime. It meant all those things just as forcefully as if he took the stand and from his own lips uttered each and every one of these denials, and to those denials, I might add, strength. It said to him, as it says to every defendant who comes into this court, "You are presumed innocent of the charge and the burden is on the District Attorney to prove the charge, and it is his beyond a reasonable doubt, by competent and by believable evidence." The law says that, "You, Mr. District Attorney, must prove the charge beyond a reasonable doubt." That presumption of innocence is his now—it is evidence in his favor. It also meant, gentlemen, that there was no requirement for the defendant Buchalter to prove his innocence or to disprove a single one of those accusations, or to explain away any charge or any accusation offered from the witness stand against him. And his failure, and his neglect, or his refusal, be it in his judgment or that of his counsel, to take the stand and make an explanation, shall not be drawn as an inference or presumption against him. His Honor shall so charge you.

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So we go into the case itself with these preliminary explanations. I say to you that this case became a cause with me after investigation when I realized that the entire case was built on a movable foundation—on a layer of quick-

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sand—a foundation that could not be anchored. That it was framed by a revengeful Rubin, aided and abetted by a cornered Berger and a trapped Tannenbaum. Do not let it be said by the assistant in charge here that I make any accusations toward him or his office. I have no such charge to make. I have no quarrel with him about this case at all. I do not want him to say to you in summation that, "If you believe that O'Dwyer, or Klein, or Josephs, and all the rest of us worked honestly and diligently in this case to frame this man, you acquit him." I make no such charge against them or anyone of them, and I make no such inference or innuendo against them. My quarrel is with the "architect" in this case—a revengeful, spiteful, hateful Rubin. Now, you may say to yourselves, gentlemen, "Would the District Attorney fall for such things?" I don't know. A District Attorney presents such evidence as he has and is given to him. He must do that. If he does not do it, you have complaints to the Governor. It is his job to present what he gets and leave to you jurors to determine whether or not it is worthy of belief. He neither guarantees the truth of any statement offered here by any witness or the truth of any exhibit that he offers here. He makes no personal guarantee—neither is he allowed to do it, nor am I allowed to do it. I have no personal guarantee to make for any single fact in this case and neither has he. As I said, you might say, "Would he fall for such a story?" Well, suppose he did. That does not necessarily follow that you have to. Suppose he did believe them? That does not matter. His

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belief nor my disbelief, nor my belief, or his disbelief, can invade the province of you gentlemen. It is for you to decide. I propound this theory, and I am hopeful that by giving you an interpretation of the evidence as I see it, you shall believe and give weight to my version of this story. I say to you, if the District Attorney in summation says, "Judge O'Dwyer has presented to you fifty-five witnesses and one hundred exhibits, to convince you beyond all reasonable doubt, and all doubt, that the defendant Buchalter is guilty—" I say to you, gentlemen, that you say to yourselves that Judge O'Dwyer's integrity and reputation and honesty has nothing to do with this case. It is not in issue at all. He does not sign the back of this note and guarantee that anything that his assistant presented here is the truth. We must not consider in anywise the integrity of Judge O'Dwyer's office for one single second, lest you be throwing into the scales of justice the great weight of authority, dignity, honesty and energy that stands behind Judge O'Dwyer. That would not be a fair trial for the defendant. Such weight of testimony no defendant could overcome. And I dare say I do not yield in my admiration for the District Attorney of Brooklyn to anyone, not even to Mr. Turkus, because it has been my pleasure when he was a Judge to try cases before him; and it has also been my pleasure when he was a Judge to try cases before him when Mr. Turkus was my opponent—and he was a tough but fair fighting adversary—I say a foeman worthy of his steel. There is nothing personal here, it is not a battle of wits—not at all. He

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represents his side and I represent mine. The law demands of him a fair presentation of the evidence, and the law demands of me the same. If at some time I should find reason in my summation to make criticism of something he did, it is perfectly logical, it is perfectly reasonable, and I assure you it is absolutely nothing of a personal nature, because when I want to talk to Mr. Turkus on a personal nature it will be outside of the court room, in plain, simple, understandable language. That has nothing to do with the case.

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I will show you that the District Attorney himself, quite unwillingly, and perhaps by force of the right of the defendant in this case, produced evidence on his case which showed that Buchalter is innocent of this crime. Well, it will take a little while as I analyze the evidence, step by step, to prove that point, but with great confidence do I say that.

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Now, gentlemen, we will go directly, directly to the issue, as I see it, plainly and simply. We have to deal, before we start with the direct case, a little with the family—just a little bit. You see, the family must, of necessity, have a say in this case. There must be the identification of the body. There must be some little background. There must be something given to you which would lead you to understand why Rosen was killed. Now, it is not my job to prove that someone else did kill Rosen. It is not my job to prove to you who else could have done it. It is not my job to prove to you why should someone else do it. It is not my job to prove any of those things. It is not even my job

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to prove that Buchalter did not do it. But I have undertaken it, and I have undertaken it from the evidence in this case. The background, as presented here by the family, is that Rosen was a truckman and he was in business. Once he was a truckdriver, then he went into business for himself. He went into business with a man named Kelly, and his business took him to small towns in Pennsylvania where work was being taken out of the City of New York. That was away back in 1931. Apparently, from the picture painted here, he had no trucks—he had no employees—he had no money—but he had a burning desire to build a route through little towns in Pennsylvania. And so he went out there and visited chambers of commerce, and he hooked up with this Mr. Kelly, who is absent in this case. And presently we get the financial picture of himself and Kelly, himself and Kelly's partnership, long before the name of Lepke is even mentioned. When the partnership joined the New York and New Jersey Company in 1931, according to the agreement we cited then, in evidence before you, there is an acknowledgment by Rosen already of indebtedness to Kelly in the sum of \$4,750. It is acknowledged right in this agreement, drawn before anybody ever dreamed of the fact that Rosen, or Buchalter, or any other such thing that was to take place in 1936. We have Sobler and Bluestein doing business under the New York and New Jersey Corporation in New Jersey, and in New York, Kelly and Rosen beginning to compete. Sobler and Bluestein knew Rosen, according to the evidence here. The competition, sometimes is not heavy and

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sometimes it is—it was not then—and it was decided, according to the evidence here, that Sobler and Bluestein, of the New York and New Jersey, shall take in Kelly and Rosen, their competitors. This was in 1931. The agreement was reduced to writing. Kelly and Rosen were to contribute the sum of \$1,000., to be payable in two instalments, \$500. in one instalment and \$500. in another. Kelly, apparently, had a garage. Kelly agreed to contribute his trucks into this new set-up, and he did. Sobler and Bluestein contributed \$1,500.—that is the testimony—and so this company starts up—Sobler's trucks, Kelly's trucks, and Rosen's efforts to build up a business in Pennsylvania. Before the stoppage—this is 1931, mind you. These agreements were not drawn with the view that Rosen is going to be killed in 1936. They were not drawn with the view that there shall be a stoppage in 1932. So we can take into consideration the picture that existed before the stoppage, the financial condition of Rosen in 1931 and in the early part of 1932, before the stoppage. You have heard here testimony that each was to draw \$75. a week, and that after the first month the money was gone. Do you think, if this was a going concern, gentlemen, a progressive concern, a successful concern, that Kelly would not have had his rent paid for the garage that he contributed to this partnership? Do you think he would not have had the money to put in as part of the instalment he agreed to pay? Do you think he would have filed a petition in insolvency in 1932, if that was a good paying business? In disgust, Kelly files a petition, and he sets forth that his wages were not paid, his

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rent was not paid, he wants to get out. And he does get out. By agreement drawn in 1932—the 27th day of April, 1932—this, more eloquently than any piece of evidence in this case, should prove to you that there is not any proof in the charge here that Buchalter forced Rosen out of a going business. It was not a going business in the sense it was going up, but it was a going business in the sense it was going, going, going down. It was a dead and dying business. It did not give him a livelihood except for the first month, and that was not earned—it was drawn from the contributed capital. And you may study this document and its contents to prove to yourselves how badly off this organization was when Kelly was through. What did he get out of it when he got out? What did he get out of this going concern in April of 1932? \$100. in cash—not a penny more—two notes, \$304. being the total of them, sub-divided in two instalments, one to be paid in sixty days and the other in ninety days. That is the kind of a progressive business this was. And in the agreement there is a provision—and this illustrates the faith that Kelly had in the financial stability of this concern—that for \$304. he was willing to take \$250. in cash rather than to wait those sixty or ninety days. Kelly's judgment was good, because those notes were protested. He would rather have the \$250. in cash than wait sixty or ninety days. And this agreement further shows that the money that Rosen owed Kelly, the \$4,750., apparently an obligation that accrued to Kelly during his own relationship with Rosen, was cancelled. It is right here in this agreement.

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10673 A man does not throw away \$4,750. if there is any thought or idea—if there is only a chance in a million—to get it. A man sues for the money, a man duns for the money, a man gets a judgment for the money—men are examined in supplementary proceedings when a money judgment is obtained. A judgment is good for ten years, and, if docketed, is good for another ten years. But Mr Kelly, seeing the set-up of Rosen and his partners then, especially Rosen, cancelled this indebtedness of \$4,750. So, gentlemen, Kelly is out of the business. "Good riddance," he probably said to himself. And Rosen, and Sobler, and Bluestein, continue the New York and New Jersey.

10674 Well, let us see the picture. When Kelly goes the partners' drawings are reduced. You might think business would start on the up, but it does not. Garage bills are not paid, finance companies seize the trucks, there is proof here. Bank balances? Bank balances for that concern? Dividends for that concern? Gentlemen, this was one of the most thoroughly investigated cases on the part of the District Attorney's office I have ever seen. Do you think that anywhere in this State, or in New Jersey, or in Pennsylvania, or in Texas, there was a bank balance which would show a progressive nature and financial stability of the New York and New Jersey, that Mr. Turkus would not have had it here? Oh, he would—he would. He had Dun and Bradstreet's report of the Raleigh—he had the financial set-up of the Raleigh. It is a compliment to the efficiency of the District Attorney's office that they neglect nothing in unearthing

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evidence, and if they had it in this case it would have been here to contradict the contention that the business of the New York and the New Jersey was financially unstable long before the stoppage. You might say, "Well, why didn't you bring it?" Again, I say to you, that would be shifting the burden of the District Attorney's. I need not bring testimony—I need not explain anything or bring any exhibit in here. But you can draw the rightful inference that, if there was such a bank balance, or bank statement, or any financial statement, to disprove our contention, you would have had it here. The fact you did not means it adds to the strength of our argument. But Sobler's testimony on that point was the Gospel truth. The company was absolutely down and out.

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I will illustrate further as I proceed on that point. When Rosen got out of this concern and went to work for the Garfield, at the conclusion of the stoppage, remember, he had in this corporation a fifty per cent interest. Well, I should not say a fifty per cent interest, but fifty shares of stock. And Kelly, having sold out, he had a one-third interest. That is more accurate. He had fifty shares. He goes to work for the Garfield. There is back pay due him from the New York and New Jersey. If that company, as the District Attorney would have you believe, was a going concern and paid a good living for everyone, do you think, gentlemen, that Rosen would not have insisted on the value of the shares of stock in that company by claim or by law suit? Is there any proof here that after Rosen disassociated himself from this concern he made any demand upon the New York and New Jersey

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for the value of his shares of stock? Was there a law suit started? If there was, if he deemed it of value, even to the extent of \$100., Rosen, who was financially down and out, would have demanded his share, or the value of it, or his back wages. Again, the dockets of this county, or any county, or any State, would have been searched. The family would have told you that Rosen made some claim for the fifty shares of stock. But he did not, and they did not give any such evidence because there is no such evidence. Rosen, in his own mind deemed it absolutely valueless and worthless, because this agreement recites that any retiring partner has the right to demand the book value of the shares of stock he holds, or else he can consent to sell it in the outside market. Did he do that? I will tell you why he did not do it. He thanked God to get a job at \$100. a week net as distinguished from his sad plight when he was in this company, drawing only \$75. the first month and thereafter drawing whatever he could get. It was suggested here, "How could he live if he did not make any money?" He can. It is not my province to prove to you how people live. We know people who don't work. We know people who manage unsuccessful businesses, and yet they live. I can only say that people can borrow, people have friends, people can pawn, people can hock, people can sell jewelry. I don't know how people live, and I don't have to answer that. "Living" is a relative term. Some people live one way, some people live another way. That is not my problem, gentlemen. How do you live? I don't know. For the purposes of

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this case, and I do not say it unsympathetically—for the purpose of this case it does not seem to matter at all. It is strange, isn't it, that the son and the daughter, who say they worked there, did not know a single thing about the financial set-up of the New York and New Jersey. They did not know about the office, the unpaid bills, the head checks, the employees; they did not know the salaries of the respective people.

Let us go into it in more detail with respect to each witness— Let us analyze this—because from the family's point of view, and how Rubin got them to play a part in this case, we are confronted very, very fortunately with the truth, no matter how you wish to conceal it and disguise it and hide it. Somehow or other it gets out, even from the State, by the District Attorney. Their own inconsistency proves the falsity of some of the statements made by the family. The first one offered—Mrs. Rosen—let us see whether or not she colors the testimony and let us see whether or not she starts off with the thought, "I will say something here, I will say something here," from the very beginning, "which shall leave in the minds of the jurors as the case goes on a little dart of poison against Buchalter." You see, Mrs. Rosen—and again do not misunderstand me—I have the greatest sympathy in the world for one who has lost a dear one—the killing of Rosen was barbaric—it was unwarranted, it was unjust—there is no doubt about that. But you don't punish anybody because of that. Certainly, how easy it is for the District Attorney to say, "Did they give Rosen a fair trial—did he have twelve jurors—did he

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have a court—did he have a reasonable doubt—did he have two or three or ten weeks within which to try his case?" Well, such an argument is pleaded because the barbarians who slew Rosen did it in the manner in which they did—but that does not mean that we have to reach the same level. This court is not a court of vengeance—it is not run for anybody's benefit. We have got to proceed according to law. And when I refer to Mrs. Rosen's testimony, I must analyze it from the point of view of whether or not she has told the truth in this case, irrespective of my sympathy for her as the widow of the man who was the victim in this case.

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First, what is Mrs. Rosen's status in this case? Her residence is all of a sudden at the Half Moon Hotel. I shall never forget the Half Moon Hotel. The last three months she says she has been residing at the State's expense at the Half Moon Hotel. I do not criticize the District Attorney for handling his witnesses. He may handle them any way he wishes. For my part and for your part, if the taxpayers want to pay a Waldorf bill, she could live at the Waldorf. But we must consider the treatment of witnesses in the light of whether or not such treatment induces people to falsify in this court. We must not swallow every word they say. We must consider whether or not that treatment has induced, or is conducive to the witness, first, to associate with others, and, secondly, whether or not it induces her to tell this story. Why is she living at the Half Moon Hotel? It may be said, if it were assumed she were to be intimidated, she would be threatened, she would be injured. But you cannot speculate as to that, gentlemen. If

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it was true that she was intimidated and threatened, you would have the evidence right here.

Mr. Turkus: I must object; the intimidation of witnesses cannot be in the case unless it can be attributed specifically to the defendants.

Mr. Barshay: We know that.

The Court: Gentlemen of the jury, in your absence the Court struck out, or granted the motion to strike out the testimony of Mrs. Rosen on the alleged identification by her of Weiss as the man who came in and bought cigarettes. That identification was stricken out, so there need be no argument on that. Likewise, there has been stricken out upon motion such part of the testimony of the son and the daughter of the deceased Rosen as had to do with the alleged financial condition of the business, this because, obviously, they had no real knowledge on that point, and you are not permitted to guess, to take their guess on it. So that need not be argued, either.

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Mr. Barshay: It is plain to the Court, your Honor, I am not arguing about any identification.

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The Court: Gentlemen, it would confuse you, and I don't want to confuse you.

Mr. Barshay: I was not going into that.

Mr. Barshay (Continuing): I am not concerned with any identification, gentlemen, by Mrs. Rosen of anyone in this—

The Court: That is out of it. Her identification was no more than no identification at all.

Mr. Barshay (Continuing): I am not concerned with that at all, gentlemen, and I am sure I have not proven the instability or the

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financial instability of the New York and New Jersey through any testimony of young Rosen or the daughter. But on the question of whether or not Mrs. Rosen's being confined at this hotel, at the Half Moon Hotel, I have a right to comment. I say Mr. Turkus is right. It cannot be shown unless it was attributed to the defendant or his authorized agent. But even at that, there is not a scintilla of evidence in this case—you see, all the time from 1936 until three months ago, we have no proof she lived at any hotel under guard, but I am worried about her living at that hotel for the reason of possible association with the Rubens or with the Tannenbaums and with the other witnesses who made the Half Moon Hotel their living quarters. Ah, you may say to this, "But they are under guard, under constant supervision, twenty-four hours a day, no communications, detectives were there." Well, that theory has gone out of this case forever. Another man shall speak of that, but the best proof of it is one that I might mention, that Bernstein was forced by Mr. Rosenthal to admit that he had an opportunity to write or mail six letters. You will be illuminated by that able gentleman on that situation. That is why I spoke about Mrs. Rosen's presence at the Half Moon Hotel, sojourning in the summer home of the "architect", Mr. Rubin, who was there at the same time.

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And what does she say that is material with respect to Buchalter in this case? She says she went to Cooper—she went to Cooper with Rubin and she said to Cooper, "My husband is an honest man, worked hard all his life, you dis-

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charged him without any reason whatever." Gentlemen, she had a right to say that. She had a right to uphold the honor and integrity of her husband. She had a right to complain and seek redress from Cooper. She had a right to know why he fired him. I don't find any fault with that. But what I do definitely find fault with, as you must, is the truth of her testimony when she gives an answer in this court which, by the District Attorney's own proof, is a damnable lie. She said that Cooper said to her, "Don't blame me, Mrs. Rosen, it is not my fault, go and see Lepke." That is the fault I find with her testimony. She came here with a deliberate lie on her lips, not realizing, not realizing that the truth would come out through a co-witness of hers, because no matter how hard you try, no matter how perfect everything is of importance in this case, no matter how good Rubin is at manufacturing a story in 1940, he could not fit the characters in absolutely perfect. Rubin told you— Rubin told you that he took M^{rs}. Rosen to Mr. Cooper. And Rubin told you what Cooper said, "I don't want him back, he bit the hand that fed him." Rubin told you—the District Attorney's witness told you, that it was Buchalter that got him the job—it was Buchalter who went time and again and pleaded with Mr. Cooper—dozens of times—to take Rosen, and after he learned of his discharge to take Rosen back, but Cooper was adamant, he did not want to do it for reasons of his own; he did not want to take Rosen back. The truth is that Buchalter tried with might and main— I don't care what reason is ascribed for his trying, but I do know it cannot be to

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appease Rosen, because it was 1933, and there was no Dewey on the horizon as special prosecutor in 1933. He did not come into the picture until June of 1935, or July of 1935. So, you see, gentlemen, she comes here to stick a poisonous dart into the defendant Buchalter. She tried with might and main to benefit her husband and she says, "Blame Lepke, it is not my fault." Cooper said no such thing—no such thing. Every chance that Buchalter had to do something for Rosen in getting him employment, Rubin tells you Buchalter did, and when you catch a person in so vital a lie, it finally gets out and goes to the very credibility of this person's testimony, plus what the Court said, plus what I proved, and you have a right to ask is the rest of her testimony in this case of any value. She said her husband showed her \$200. and that he went to Reading for a week-end. Some innocent things are very easy to interpret in a criminal way. Fathers do go to visit their sons out of town for a week-end—it can happen—it has happened—it does happen, and it is going to happen in every family. So they see an opportunity to make the visit to the son in Reading, Pennsylvania an element of a threat to flee and stay out of town, "until we want you to come back."

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Let us see if that is an honest interpretation of that visit by Rosen to his son. If Dewey were looking for Rosen, and there is no proof he was—but let us say if he was—the easiest place in the world to look for a man is, first, find his family, and then through the family trace him. Any intelligent police officer knows when he is looking for "A", he goes to the wife.

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or daughter, or son, and through them he tries to find where the missing individual is. What was the use of his going to Reading to hide?

Mr. Turkus: Mr. Barshay is talking about something not in the evidence.

Mr. Barshay: I said, "If he was looking for Rosen." I did not say he was. I will argue from the two points.

The Court: That does not call for interruption. Each side speaks for the side it represents. (Addressing the jury:) You heard the evidence and you know what to take and what not to take. Unless there is a wide departure from the evidence, the Court will not interrupt.

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Mr. Barshay (Continuing): Or, if you take it Mr. Turkus' way—if he wanted Rosen to stay out of town until he is told to come back—and, mind you, this is in 1936, the Dewey situation going great guns, he gets \$200. to stay away until he gets told to come back. How long can a man stay away with \$200.? Is there any other arrangement made for the subsequent payment of money? Is there any deal made, "You go here, I will send you money every week," as in the instance of Rubin when he was fleeing, I say, from Mr. Dewey's office. If you are going to have a man run away and stay out of town, you are going to make some arrangements, aren't you? You are going to say, "Now, here, you got there, from Orlofsky you get \$50. every week, and from us you will get \$25., I will take care of your wife, I will take care of your family." It was useless to have Rosen go away under the conditions, because if Rosen went away forever, it would not make any difference. There had

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10703 to be one more person taken care of in this picture to give Mr. Buchalter the complete protection which the District Attorney wants you to feel he sought from Dewey. You must not forget that at the so-called conference on 19th Street, when Gurrah said, "Go here, go there, don't go here, don't go there," it was not only Rosen that was present, but his daughter, Miss Rosen. If Rosen never said a word, she could have, she could have explained to the Grand Jury, or to the police, or to the District Attorney, all that happened in that room. She was just as important and vital a witness as anyone in the room who wanted to testify against the defendant Buchalter.

10704 But, now, let us go back to Mrs. Rosen. She does admit, she does admit after much pressure that her husband did have some heart condition, or a complaint, I should say, about his heart condition. So, gentlemen, she, the first witness in this long drawn out case, starts you jurors off with prejudice, that in 1932 Buchalter was responsible for the firing of her husband. Off the stand she goes, but sitting throughout the trial for fear that the poison, the talk, the thought she expressed was sinking, sinking constantly into the minds of the jury. And you cannot have any love under those conditions for a defendant. It is natural we all have prejudice, and she came here digging that prejudice deeper, deeper and deeper into your hearts. I don't know if such a thing can be disproved, even twenty days later, or four weeks or five weeks later. You have it now, gentlemen, with respect to Buchalter, that Mrs. Rosen told an absolute

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and complete lie, proven not by me, but by the District Attorney himself.

So we go quickly to young Rosen. To judge whether or not a person tells the truth, how are we going to judge? Well, we must take next into consideration—first, what would be the normal reaction of a family whose father has just been the victim of a brutal shooting? As you know any family, and as I know any family, and I say it fairly and respectfully, they are incensed, they are vengeful, they go to the authorities, the police, the District Attorney, and to the Governor, if necessary, and they want to bring to justice those whom they think are responsible for their plight. That is normal. They don't sit back calmly and coolly and say to the assistant in charge or to the detective in charge, "Ask me questions and I can give you answers." They tell the authorities every single thing that occurred that may give the authorities some light, some light, in order to bring to justice the perpetrators of this crime. Well, the authorities themselves in those days, in 1936, were stumped. What is my authority for that statement? Mr. Turkus is my authority for the statement. This is what he said in his opening: "The murder was committed; the killers fled from the scene in a stolen car; they abandoned the car at a railroad bridge, and escaped without identification." No clues; the authorities have had no human being who could identify any one of the participants in the commission of that crime. And you cannot manufacture witnesses whether you are a District Attorney under the old administration or under the new adminis-

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tration. Mr. Turkus said, "Without identification," and he went through this case with a fine-tooth comb, and I dare say he questioned every human being connected with this case, but still it remains, "They escaped without identification." And so the authorities, then, have no aid from any human being to point out who the killers were. He goes further. He gets not a single fingerprint clue that was found on the murder car. In other words, there wasn't any evidence through which they could trace, or to show a fingerprint clue, through which they could trace the participants in this murder. Only one of the guns was found in the killing, but had the serial numbers obliterated, blocking trace of its sale or ownership. I say he speaks with authority, gentlemen, because everything he said must have been done by the police in order to find the perpetrators of this crime, and he gives final approval to what I say here in this sentence—"In short, the killers had made a clean getaway and left no clues in their wake." And so, no matter who the District Attorney was, no matter who the Police Commissioner or his men were, on Mr. Turkus' own statement, the perpetrators of this crime left not only a shred of evidence through which they could be gotten, but you do not abandon the case, gentlemen, because of even that. You cannot say, "That is the end of the case, there are no fingerprints or clues." There are other ways. What are the other ways? There is always a background—the family, the intimates, the business associates. And so I take it, in the normal reaction of the family, they would have told anything and every-

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thing connected with the father's business or his personal or private life to draw in people who might be involved in this case, in the hope that someone would spill the beans, and then maybe the confession of a person could be had to prove, substantially, that maybe someone was threatening. I gather that was done, because the family was sent for.

So, young Rosen testified in the Grand Jury, and while I asked for the Grand Jury minutes, the Court looked at them, in accordance with the law, and said nothing was asked in it, and, consequently, nothing was answered. I am talking about the 1936 Grand Jury when the investigation was going on. Nothing asked and nothing answered in the Grand Jury. Do you think that if a loved one was murdered the way Rosen was that you would have to wait to be asked to volunteer such a vital piece of information as the pantomime that went on in the Broadway Central, on the basis that maybe Lepke was connected with this case? You would give it to a lawyer, you would give it to a cop, to a District Attorney, a policeman, anybody who would question you and who would say in going about the investigation, "Give me what happened in 1931 and in 1932, and what happened in 1933, 1934 or 1935." Was this done? Were questions asked and answers made? You could not keep a son quiet nohow. But he did not say a word. He did not volunteer, I should say, a single word about this Broadway Central Hotel, this pantomime that he saw through the door from fifteen to twenty feet away.

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Now, think of the inconsistencies in his story. He remembers now, in 1941, or in 1940, some-

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10715 thing which he failed to state in the Grand Jury in 1936 about the pantomime in the Broadway Central Hotel. I don't understand it. Maybe you do. Ask yourselves this question— In one breath they try to paint Buchalter as a man whose word was law in the underworld when connected with unions, and that by one snap of the finger, or the batting of an eye-lash, he could have the Tannenbaums and the Bergers and people of that kind do his bidding. In the next breath they want you to believe, with Mr. Maguire's talk, the threat of intimidation would be undertaken personally by the so-called king of local racketeers—that he would attend to it personally. Well, if he attended to it personally he would not have done it at one of the many offices he is alleged to have had, but he would do it in the public lobby of a public hotel, when everybody was looking on. They were in there forty minutes—I take it they were in a room, if they were there. But there is no register shown here that there was any such meeting.

10716 There was, with Rubin—the All Saints Hotel and the Shelton Hotel—they can get everything that suits them—that is all right—but Mr. Lepke, Mr. Buchalter could be pointed out standing in the lobby surrounding himself with Rosen, moving forwards and backwards, without anyone knowing what went on. Nobody invited him there, and they have not told you what went on. It has nothing to do with the case, gentlemen. I think the Court put it very well when it said, "The jury cannot be permitted to conjecture about what was said—about the alleged pantomime—it has to depend upon evidence." That is there

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for an extra arrow to thrust the poison dart into the heart of the defendant Buchalter. That is all it is.

But the thing that interested me more about the Rosen testimony was really something that had no bearing upon the main issue in this case. That gives me a chance to comment on the question of whether or not it is really intended to present this case in its true light. The very last question asked of Rosen by Mr. Turkus was, "Mr. Rosen, tell me, did anybody in this court room visit you in 1941?" Mr. Rosen said, "Yes, those men over there," and he pointed to the venerable James I. Cuff and myself. Well, there are a lot of people who have the idea that a defendant's lawyer has no right whatever—that we have no right whatever to investigate cases—that we have no right to interview witnesses. And if people hear of a lawyer for a defendant wanting to see a witness for the People, for the prosecution, why that lawyer isn't any good—he is there for an illegal purpose—he is there, perhaps, to suborn perjury. But they do not know the ethics of the profession. Do you remember the Judge sustained me when I read to you each and every word of Section 39 of the Code of Ethics of the Bar Association and of the American Bar? Don't you recall that? Why should Mr. Turkus have done that? Do you think that helped him in the case? He did it because he thought it would leave in your mind a thought that the defense was up to something crooked. I would not be half a lawyer if I did not try to see the witnesses in this case—and, if the cops did not bar me at the Half Moon, I

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would go to Reles, or Bernstein, or Tannenbaum, or Rubin, or Berger, I would go anywhere, even into the association's office, because under the law I have the right to do so. I have not the power to subpoena a man and compel him to come to my office, and the District Attorney has not the power to subpoena a man to come to his office. But the people do not know that, so the District Attorney sends out a detective, who puts his hand on your shoulder, and says, "You come to the District Attorney's office." The only power he has is to subpoena before the Grand Jury. But the man in the street does not know that. So he brings them there—he brings a man from his business, from his house, from any place. That is because you don't know your rights, but it happened to be that Jim Cuff and I knew about it, and if there was anything surreptitious about our visit, you would have heard it, and then you could attribute to the defendant that, being his lawyer, my acts could be attributed to him. But I did not like it. I was astonished and surprised. It was the first unpleasantness I had with my young adversary in all the years he and I fought each other when I was an assistant prosecutor.

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(A ten minute recess was taken at this point, at the request of Mr. Barshay, the jury being admonished as to their demeanor during recess.)

(After a short recess the jury returned to the court room and the summation was resumed.)

Mr. Barshay (Continuing): Again, gentlemen, we go back to the Rosen family, and we

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take the last of the family, Mrs. Greenspan, and we analyze her testimony. Briefly, I must repeat, I take it that she, too, at the time this happened in 1936, was of a vindictive mind. She had a right to be. Her father was killed. She had a right to, and judging from her attitude on the stand she illustrated she was vindictive. She had a right to be, and she was vindictive. She is the type of an individual who would rip up the Police Department, she would rip the District Attorney's office apart, if they did not do everything possible to bring the perpetrators of this crime to justice. And, sure, she was right, too. And, feeling that way, she, too, would have then told the authorities everything that helped in view of the fact that no identification and no clue of any kind was left. She, too, would have told everything she knew in order to enlighten the authorities to a successful investigation of this case.

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Now, we asked the aid of the Court for her prepared statement to Mr. McCárthy. You would think that in that statement to Mr. McCarthy she would have said something about a meeting in 1932, which in this case is the very basis of a motive to kill Rosen—the threat to Mr. Rosen to put him out of business and the threat of Rosen to tell Dewey—it was so vital, it was so important. She was present—she was the only member of the family present in 1936 to hear everything on that proposition. Again, the Court said, substantially, “I have examined the statement and I find that nothing is in it—nothing was asked and nothing was answered.” And, again, I repeat to you, how could McCarthy, or any human being say to her investi-

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gating this case, "What happened in 1932?" What would prompt that question? Mind you, this is the same Mr. McCarthy whom Rubin described as the person who was going around, according to Buchalter, "Yelling his head off, and saying, 'I am going to make the biggest collar of my life.'" It would have been—"I am going to catch big fish—I am going to catch Lepke and Gurrah—" It would have been. He was ambitious like every young assistant district attorney. He wanted his reputation enhanced. He is going to catch Lepke and Gurrah. Rubin would have you believe that statement was made to him by Buchalter—that it scared Buchalter to the point where he said, "You, Rubin, get out of town." That is how much they feared him, according to the record here. We can go by no other testimony than the record here. But she had to wait to be asked about the 1932 meeting. She did not recall exactly when it happened—1931, she said—the spring of 1932—the fall of 1932, and she described it at the place of some coat company or canvas company, subsequently better identified by Mr. Rubin as the Perfection Coat Company owned by Wiener.

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Well, I said to you that Rubin was planning this case and avenging himself on the defendant Buchalter. He was shot in the head. He waited his time. He blamed it, unjustifiably, I say, on the defendant Buchalter, and he was picking his cast. It was a cast hard to choose, and it took him a long time to choose, but one thing is certain—he anticipated very little difficulty with the Rosen family. But prior inconsistent statements made in court might be the "bone" in his throat, and I dare say in this instance, they

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were. You see, he had no access to the testimony of the Rosen family away back in 1936. He did not know that she never volunteered a single word about this meeting in 1932, so he said, "Who was it, Gurrah?" Do you think I would let Buchalter call Gurrah as a witness for him? He is alive, but Danny Fields, who was there, is dead. But, Rubin, the paragon of virtue, we will talk about him later.

Now, the Rosen family—the jury will be sympathetic—they will believe her, she is the daughter of the victim. The prior inconsistent statement, for it is inconsistent, and I say it is inconsistent because she would have told it if it were true—but let us go further along that line. You have had corroboration on lots of things in this case. If a man finds a gun, they have a picture of the spot where the gun was found. If a man describes a garage, they have a picture of the garage where the car was stolen from. If a man has a car stolen from the street, they have a picture of that—a fine, thoroughly investigated case. But where is there someone from this coat company—this Wiener from the Perfection, or whatever they call it, on 19th Street or 17th Street, whatever the address is—there is no proof that he is dead. There is no one in this court room to prove to you that Lepke had a right to use that office. There is no Wiener. I know, he may say, "You could have called him, he was just as available to you." Well, he was just as available to him. Then, again, you may answer, "If there is a law that the burden is with him," you jurors are forced to enforce that law. I need not call any Wiener, or anybody else. I need not disprove anything in this case,

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but you have the right to infer, if there was a meeting of that kind, there would be a Wiener, or some other person connected with that office to give independent proof of the existence of such a meeting. I say she has a right to be vindictive, yes, but we must judge her testimony if her vindictiveness induced her to utter falsehoods from this witness stand. Is she vindictive, is she afar from the truth in this case? I shall illustrate to you. But one more word about that meeting. Picture again that meeting. Rosen is sent for, and Gurrah points to this customer and to that customer, to this one and to that one—I take it, it is about the time of the stoppage, because Rubin, who goes from the very foundation of this case, ascribes no other reason for Rosen being sent for other than the stoppage. The stoppage, he says, took place in August, 1932. Well, can a person be mistaken about time? She says September—she says this and that date—she says her father worked three months after this meeting in New Jersey, when the proof is absolute that during the stoppage, or immediately thereafter, Rubin says that he, Rosen, went to work for the Garfield. So, it could not be that he was in business three months—he could not be in business two days after that meeting, or at most a week. He could not be in business and work for the Garfield at the same time. He was there, she said, twenty minutes. Again, I say, either they paint Lepke as the damndest fool in the world, or they paint him as one of the smartest racketeers in the world—I don't know. If he is the damndest fool in the world, that is one thing, and it is inconsistent with their theory that he became the

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kingpin in the so-called crime center of the flour industry and all the rackets of which he is accused. Do you think he would, if he was violating any law, or making threats, or uttering intimidations, or forcing people out of business, he would let an additional witness, a daughter of Mr. Rosen, be present? Nobody on the part of the defendant in the group of men there asked her to leave. Nobody. Rubin said so— He said so— The only one that asked her to leave was her own father, which indicates to you, gentlemen, that there was no desire on the part of the defendant or his associates there to get rid of her and to obviate a witness being in the room. It indicates he did not care whether she heard all the words, or a single word, or anything he said. He did not look for witnesses, if he is such a thief and racketeer. Assuming he could not delegate this part of the business to Rosen, and she describes that entirely different from Rubin. Rubin was there all the time. She said that Gurrah said, "You cannot go here, you cannot go there." He did not speak with excitement and threats. As a matter of fact, Rubin said that Buchalter said, "You have a lot of business, Rosen, don't kid me, but if you are in any trouble, you come to us and we will help you." That is what the record says. She says her father got white with excitement—that he paced up and down, and that he defied Mr. Lepke, and Mr. Gurrah, and Mr. Rubin, and Mr. Danny Fields, and he said, "Nobody will take what I have in Pennsylvania." What did he have in Pennsylvania? What did he have that anybody could take? Rubin said, "One customer." My witness, Sobler, said, "Four or

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five customers." Whether he had four, or five, or ten, or twenty customers, the fact is that financially it was a complete and total loss. But she is in this room—nobody but her father asked her to leave.

10739 Gentlemen, by her own testimony she is not called by the District Attorney's office until 1941. She says when she took the stand that she first communicated with the District Attorney's office a few months ago. What does that mean in plain language, when she says she was not sent for until a few months ago? I will tell you what it means—it is most significant in this case. Lepke was indicted in 1940. Rubin saw McDermott, O'Dwyer, and Turkus, and Hefferman, and Klein, and Josephs, around that time. If Rubin told, even in 1940, about this meeting, even in 1940, mind you, when he was no longer afraid of anybody, about this meeting in 1932 when Sylvia was present, do you think this young, efficient, thoroughly competent, assistant district attorney, or Judge O'Dwyer, or Captain Bals, or his staff, would not have sent forthwith, 10740 forthwith, for the daughter of the deceased? Oh, yes, they would. Do you think they would allow all these months from 1940 to pass without sending for Sylvia Greenspan to corroborate Rubin on a vital and important part of this case—the basic motive in this case? They would have. But Rubin did not mention it— Rubin, the planner and schemer, the man who resides at the Half Moon Hotel, it takes him a long time to pick his cast. Berger, they did not "case" until June 5, 1941. Berger, whom he says was in it in 1936, was not arrested, charged, or questioned in this case until June 5, 1941. It takes

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him a long time to pick this cast. Rubin says, "Maybe I would not be believed by a jury." Rubin is in the Half Moon Hotel and Mrs. Rosen is in the Half Moon Hotel, and young Mrs. Greenspan visited her mother—maybe they did not talk to each other, but the mere sight of young Mrs. Greenspan by Rubin would give him a thought. "I got it, I got it, I will have no trouble with his daughter to talk about the meeting in 1932." That is how she comes into this case. She is a witness of the 1941 vintage, and for no other reason. Her attitude—listen to what she says, when asked, "Did Buchalter get a job for your father with the Garfield?", and her answer, "I don't believe it." She doesn't believe it, but isn't it true, gentlemen? You see how much she knows about this. She did not even know that Sobler was a partner in this business. On direct examination they said there were three partners, Kelly, Bluestein and her dad. On cross-examination she was prodded and prodded, and finally the name of Sobler was suggested to her, and then she says, "I think he was a partner." That is how much she remembers of these by-gone days. "Did Larry Cooper fire your father in 1936, or did he quit voluntarily?", and the answer was plain, she said, "He did not quit voluntarily, I don't believe that."

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So I say she has a right to be vindictive, but you have a right, too, to reject her testimony if you find that her vindictiveness in this case induced her to swear to untruths. And that rule applies to her even if she is the daughter of a man who was brutally murdered, Mr. Rosen.

Now, what happened in this room. I am going

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to give the District Attorney the best of it. Assuming that an argument took place—and I do not concede it, gentlemen, but I do want to make my point clear, so that for the sake of argument—I will concede only for the sake of argument that this meeting took place in 1932 in Wiener's—I hope you, gentlemen, will not mistake the fact that I concede it for any other purpose but for the sake of argument. What did Lepke have to fear that Mr. Rosen could tell to Dewey? The Court said we should be bound by the record in this case. Buchalter is charged with forcing Rosen out of business; that there in the room the fact was accomplished—the basis for it was accomplished—the starting point to force Rosen out of business was there. I searched the Penal Law, and I am not an authority on the law, but I have had some experience—I have instructed law at the Police Academy, the same as Mr. Klein is doing now, for several years. I had some experience as an Assistant District Attorney and as a lawyer. I wanted to know what is it that Mr. Dewey could prosecute Buchalter for in forcing Rosen out of business, assuming it were true. What crime was it? I searched diligently—maybe I am wrong—I am going to ask the Court at the proper time either to corroborate me by charging the jury on this point, or he may refuse to do that, I don't know, but I hope I will be allowed to make my point clear by way of argument because it is based upon this record, the ordinary inferences from this record. I found 530 of the Penal Law, which is called "Coercion". Briefly and substantially, it says, "A person who with a view

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to compel another person to do or abstain from doing an act which that other person has a legal right to do, or abstain from doing, wrongfully or unlawfully uses or attempts intimidation on such person, by threat, or force, is guilty—" of what? Of a misdemeanor. In other words, Rosen, according to this section, like any other person, had a right to be in his business if it was the worst business in the world, even if it did not pay five cents in wages to him, he had a right to be in business. I don't deny that. A man can own a candy store or a big business—he can lose his shirt—but he has a right under the law to maintain himself there the best he can, and no Buchalter, or anybody else, can put him out of that business, without law or right. But the law says that Buchalter, or anyone else who puts a man out of business, is guilty of what—he is guilty of a misdemeanor, mind you. I think the Court shall charge, and I hope it does, that the maximum penalty for a misdemeanor, which is the lowest form of crime, is three years. I think the Court will charge you, and I hope it will, that the Statute of Limitations for a misdemeanor is two years. So that, if Buchalter committed a crime, I say, conceding for the sake of argument that he did force him out of business, the only crime he committed punishable by law, because there was no physical assault upon Rosen according to this record—I mean he was not beaten, nobody laid a hand on him, or you would have heard it—I mean that is practically conceded by its not having been proven—so the threats were, according to their testimony, the forcing out of business of Rosen. The Statute of Limitations for a misdemeanor, I must repeat,

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- is two years, so that if it happened in 1932, Buchalter could not be punished beyond two years after 1932—let us say three years. There is no proof here that Buchalter ran out of town prior to his final running out. There is no proof here. Rubin says he was always around. Berger says he was around. Tannenbaum says he was around. But if you are not so satisfied, the limitation is increased by the time you are out of town. The statute does not run, and we will give him the benefit of the doubt and say to you, let us say, it is three years—Buchalter would have nothing to fear from Dewey by way of Rosen in that regard. I say the Statute of Limitations has run, but before it was amended he would have to fear the three years penalty. So, gentlemen, do you get my point—that Buchalter, who was being looked for by Dewey as king of the flour racket and king of the crime racket—he was looked for by the Government—he had so many charges hurled against him that everybody in this universe was searching for him, that he would worry about a possible misdemeanor? I say, “Possible misdemeanor” at the hands of Rosen. What proof is there in this case by anyone that Rosen was roaming the streets of Brownsville threatening to go to Dewey? What could he tell Dewey? Nothing. Because, in telling Dewey that four years ago Buchalter drove him out of business, I take it he would also have to tell Dewey the good traits of Buchalter—that he got him a job—that he tried to get him another job—that he effectuated transfers and that he got him \$100. and \$125. a week. What was there that Buchalter had to
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fear at the hands of Rosen with thousands of complaints running to Dewey in extortion totaling a half a million dollars? Would he worry about Rosen, an ordinary poor truck driver?

Well, I know Mr. Turkus is making a very good note about this because he will have to answer to you. It is sound reasoning that I shall anticipate what Mr. Turkus will answer. I may be wrong, but have you any better answer from the facts as he gave them to you? There isn't any evidence other than the speech of the unbelievable Rubin that maybe Buchalter thought it would be a warning to the rest of the trade. There is no proof of that here. You cannot speculate. If that is his answer, I don't know, but I cannot think of any other argument he can give. But, again, I must remind you that the killing of Rosen, if that was the thought, would not be sufficient to make peace for Buchalter, because there was a daughter, there was a daughter still present and outstanding during the intimidation and threats to force out of business. And you could not keep her down with an army, and I would not blame her for not being kept down with two armies. So that is not the answer he can furnish from the evidence.

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What was it that Rosen wanted, according to Rubin? Was it another job? Well, if he feared him so much, the great Buchalter, the great racketeer, he could not find a job, even if it was necessary to use force, he could not have found a job for Rosen? The great Weinstein who dominated 25,000 members of the Amalgamated could not find a job for Rosen some place? But Rosen already had a job at \$50 a week—that is a reasonable pay for a truck driver. Nobody fired

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him out of that. That is the evidence here—nobody fired him out of that. From the conditions, as described here, he certainly did not want to go back to driving a truck. What did he want from Buchalter? \$700 to buy a dyeing and cleaning business, if that is true. He gave him, too, Rubin claims, another five to keep the fellow quiet. How weak the story. You may say to yourselves, "Who else could have killed Rosen or have him ordered to be killed?" I don't know who else could have done it. It is not my job to answer that. I don't know anything about Rosen's private life, or his associations or doings with Rubin, Berger, or anybody else. I can only say to you that the evidence shows that Buchalter had no reason—he had no motive to kill him—he is insignificant in the great tangled web that Dewey was throwing around this man. But Dewey got him, and maybe he was right in getting him. Let us not consider anybody else's job—let us consider this case, as Mr. Turkus said, the Rosen case—no more, no less.

10758 So, I leave the Rosen family, and briefly refer to the man who was on the stand for five days, a complete examination, a complete direct examination, a complete cross-examination, and I would say a very lengthy cross-examination.

The Court: You are now starting on something which will require considerable time, and I take it you desire no interruption. We will now take a recess for lunch.

The Court (Addressing the jury): Gentlemen, we will now take a recess and we will reassemble at 1:30. Please do not discuss the case, keep your minds open. First, the jury may go out. Now, the defendants are remanded.

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(AFTERNOON SESSION. TRIAL RESUMED.)

(Mr. Barshay continues his summation, as follows:)

Mr. Barshay (Continuing): Before recess here, step by step, I tried, and I hope successfully, at least to some degree, to establish a reason for doubt in your minds. I shall now proceed along the same line, hoping that my reference to the evidence and the logical inferences that flow therefrom, may result in reason for doubt which under the law you must give to the defendant.

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Now, speaking in behalf of Buchalter, and only in his behalf, again I urge in my argument, because other counsel do not even have to be consistent with my thoughts in this case, as though we were receiving a separate and distinct trial. That is our position, sirs. I speak only for Buchalter and nobody else when I urge the argument—I cannot stress that too much, because someone may say, “Well, Mr. Rosenthal said this—Judge Talley said that—Mr. Barshay said this—it does not coincide, and consequently counsel are in disagreement among themselves and it leads to confusion.” I know you are doing your best to keep in mind that each one speaks for himself.

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When Bernstein took the stand—and I shall refer very briefly to him—he claimed he was an accomplice in this case, and he goes on and recites the part he played, from A to Z. I take it you shall be told that the physical facts in the case, that is, the finding of the body, the shouting, the yelling, the chasing, the finding of

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the gun, et cetera, and the pictures in evidence—you shall be told those things do not tend to make the defendant Buchalter in any respect a party in the commission of the crime. I am sure his Honor will tell you that is the law. He said once that he was not an accomplice. I will let other counsel make comment about that. But he did say one thing that is most significant on behalf of Buchalter, and he left out something which I say is very significant in behalf of Buchalter, because I take it that the District Attorney offered him to tell the entire story, and I take it, too, that he did not offer him to leave out anything disadvantageous to any defendant in the case, which under the law he could properly get from the witness. For instance, one of the important things he said here is the element involving the time when he said he, on Friday, September 11, 1936, was told to steal the automobile subsequently connected with the commission of this crime. Now, you may say to this, "What difference does it make whether he stole the car at four o'clock, or five o'clock, or one o'clock?" Ordinarily, the question of hours five years ago would be no important point. I admit that myself. I have been wondering how these witnesses could even remember what happened five years ago in such great detail. You see, gentlemen, even a stenographer has to refer to his notes when the lawyer argues about testimony given here on the witness stand a few days ago. The Court has a trained mind—lawyers have trained minds—but we constantly have to keep referring to the minutes because it is humanly impossible to retain in your memory all these things. You do

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not live exclusively for the five minutes of September 11, 1936, and divest yourself of any thought of anything else. But they all have remarkable memories. I don't know. So the element of time becomes important in this respect, with respect to Buchalter. We contend that throughout this case he was the subject of surveillance by Mr. Dewey's office and the Police Department of the City of New York. We have no right to assume that the Police Department or Mr. Dewey's office did not do a thoroughly good job, too. You know that Lepke was not just an ordinary racketeer. When Dewey lays his fingers on a man of the size, of the importance, of the magnitude of Lepke, you can rest assured of having an excellent job, check books are sought, and people are watched—especially people like this defendant—so he set a twenty-four hour guard, or surveillance, I should say. What right have we to assume that they lost him when they watched him? What right have we to assume without proof of speculation, that the Dewey men and the New York City detectives would allow him to sneak away? What proof is there in the record? It is speculation. The presumption in law is that an officer does his duty imposed upon him by law until it is proven to the contrary. We subpoenaed the record of that surveillance. The Court, in its wisdom, excluded that from perusal. It was marked only for identification. I could not see it, you cannot see it, you cannot speculate what is in it, but I have a right to comment, I think, on this part before I even had them in this court; and after I had them in this court I even asked that they be marked for identifica-

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tion. Mr. Turkus, the District Attorney, already had the right to see them, but that is not a privilege which is accorded to a private lawyer. But the P. D. and the D. A. cooperate with one another, they interchange information; they help each other. You saw Mr. Dewey's assistant here, and I take it that you have a right to infer relations between Judge O'Dwyer's office and Mr. Dewey's office, and the various departments, police and otherwise, are very good. I take it you have a right to draw conclusions by the constant presence of Mr. Horowitz, the law assistant of Mr. Dewey, that there is cooperation between Judge O'Dwyer and Mr. Dewey; by reason of the indictment involved in this case it is reasonable to accept such cooperation to exist. I take it Mr. Turkus, and you have that right to infer, knew what the police reported with respect to the activity of Buchalter that day, if they missed him, if he sneaked from them, if he succeeded in getting away from the watchful eyes of the Dewey and the Police Department men. Mr. Turkus would know that, I take it, from the watchful eyes of the Dewey and the Police Department men. Mr. Turkus would know it, and I take it in all fairness to the defendant who claims he was watched twenty-four hours a day, and was not able to sneak away, we should have had some proof from the cops assigned that day from the Dewey office, or from the Police Department, to testify to the fact that they watched him, but that the clever Buchalter sneaked away. That is a logical inference.

Mr. Turkus: There is not a scintilla of evi-

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dence in the record that Buchalter, or Lepke, was under a twenty-four hour surveillance that day.

The Court: As I called attention before, if an editing process is going to be carried out as to accuracy of all details referred to by counsel during summation, it is going to disturb the trend of thought of counsel and interfere with the proper presentation of argument to the jury. Please do not do it again. This applies to all sides. I know how it is by counsel jumping up and spoiling a speech; there must be both gold and ivory in a summation as well as in the Judge's gavel.

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Mr. Turkus: I will not do that again.

Mr. Barshay: I do not think Mr. Turkus had any thought of disturbing my thought and trend, so I will continue with my thought.

Mr. Barshay (Continuing): And so you see, gentlemen, we have a right to have some proof as to whether or not he was under surveillance that day, two hours a day, five hours a day, eight hours a day; all we wanted was to know what the hours were. You might say, "What is the matter, Mr. Lawyer, couldn't you have subpoenaed them?" Well, there are two answers to that. I did not know who to subpoena— I cannot subpoena 18,000 policemen. Those assigned to Mr. Dewey's office were assigned in a confidential manner. Yes, I could have gone to the Police Department, written a list, and I could have asked the Police Commissioner, and by a process of elimination I might have gotten it, but it is not my job to do that. Again, I say to you, the District Attorney has to sustain the

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burden of proof imposed upon him by law—not by me but by law—and this is a court of law. Rubin tells you that Buchalter told him that the cops were watching him, and Berger said so, too. They even said that they would have to sneak away, which goes to show that the cops were watching them, even if they did sneak away. But we wanted to know the truth. Where were they watched? And if they were watching him, gentlemen, you have the right to say to yourselves, would he, who had every reason in the world to sneak away from the clutches of Dewey, because he knew what it meant if Dewey caught him—would he, knowing he was being watched, associate in the public streets with Mendy Weiss, or Tannenbaum, or Berger, or Rubin? Is he a fool altogether? Was he so powerful that he could defy the Dewey men who were around him? Haven't they eyes? Haven't they arrest records, and reports to make every single day? That is why it is important to know whether in the early afternoon Mr. Rubin was at the Raleigh—whether Tannenbaum was at the Raleigh—whether in the late afternoon Berger was at the Raleigh. What right have we to assume that the police assigned to do their duty were not watching at least the front entrance of number 200 Fifth Avenue, the side entrance, or the one in the rear? Well, as Shapiro said, policemen would come up into the hallway, because Buchalter would stop and talk to people in the hallway, and they would annoy—as Mr. Turkus called them harassing sleuths. Even if such was the case, they would have to make some report. We want to know what time it was that Berger got there. Oh, how quickly he took the hint when

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it was asked of him, "Did you look at a watch?", and his answer, "I did not look at any watch; I did not look at any watch." Do you remember Berger? Watch or no watch, it was dark—it was dark—absolutely dark when he landed in Brownsville. He gave the time as 9:00 to 9:30, and he described that day as finishing his work at 5:00 o'clock and going to a certain place, and then going to the Raleigh, and then going to the East Side, then eating for an hour and a half, then waiting for Mendy Weiss, then taking a car, and then traveling to Brownsville. It was dark when he started across the Williamsburg Bridge. Let us say it was 9:00 o'clock—he said it was 9:30. Bernstein's testimony is that since the advent of Judge O'Dwyer he has not lied. Well, I will let other counsel comment on that. But he does not lie when he said it was in the early afternoon. Once he said 1:00 o'clock; once he said he could not tell, but he certainly said, and it is there, 1:00 o'clock or 4:00 o'clock, he could not remember. So, Berger has Mendy Weiss present in Brownsville, giving directions to steal a car on this murder hours before, hours before that, gentlemen. Berger says he left the East Side for the purpose of going with Mendy Weiss to the candy store. That is why it is important.

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And there is one more phase of Bernstein's testimony that to me is mighty important—I should say, rather, his lack of testimony on that point. He was five days on the stand, direct and cross. Isn't it strange that a man like Bernstein, who is trusted by a so-called group, mentioned as being a participant in this crime,

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trusted to participate in a murder, trusted to steal a car, and talk to the people—to sleep in the house and stay overnight—to ride in the car to the scene, and from the scene, through streets and out of streets—I am not conceding it is true, gentlemen, don't mistake me—I am saying it for the sake of argument, because, if I say it is true, other counsel might find fault with me. I am using his testimony for the sake of argument. Standing in the hallway, waiting for Rosen to come out, fleeing from the scene, disposing of the weapon, an association that commenced prior to September 11th and finished after the murder of Rosen—almost thirty hours, if not more. Not once, not once, does the name of Buchalter, or Lepke, come forth from the lips of Bernstein. This murder, which they want you to believe was done on behalf of Lepke, on behalf of and for the benefit of Buchalter. Is it conceivable, if that were true, that some time during all this preparation, some time before the execution, before the flight, someone would not have whispered, "Well, Lep will be satisfied," or, "Buchalter will be happy. We did it for Lep," or some such remark. It is such a natural—it is such an expected thing—to have the remark. To say Bernstein is only a middle layer—he was trusted—he was not a menial, if he is interested from the beginning to the end and he is right there when the murder is taking place. He said he was one of the parcels of that group combination. And how is it the name of Buchalter is not mentioned once? I will tell you. Once again I will tell you that I do not care who did it, or whether they did it, or whether

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they had a motive, or did not. The name was not mentioned because Buchalter had absolutely nothing to do with the commission of this crime, and the District Attorney produced the evidence better than I could ever hope to do.

And, now, they introduce Magoon—Magoon, who has nothing to do with our case at all—consider that, gentlemen, when you are looking for a reasonable doubt. I don't say I admit the truth of what he said, because the Judge will tell you, I think, that the speech of any participant in any case after the consummation of the act or conspiracy, after it is all finished, within certain limits, are binding only on the doer. I shall ask the Court to so charge you, and I think he will. Now, let us look at the record. He said that Capone said, "We got to hit Rubin for Lep." He mentioned the name. Bernstein, however, surely, positively, irrevocably, is silent. He does not even say he is an accomplice of Buchalter, but that someone in the group, in the combination, may have been. It was the most natural thing in the world, if he were involved, if it was done for him, that the name Lepke, or Lep, or Buchalter, or some other name would have been used indicating. "Well, it is our job, we did it for him." Tannenbaum also did not mention it, and I will tell you why. I will leave Bernstein to the discretion and consideration of far abler lawyers than I will ever be. I say to you now—I am coming to Rubin—the Rosen murder was committed in 1936. Rubin was motivated at least by vengeance—there may be some other reason which I do not know—but from the record, at least, by vengeance, hate, and a desire

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to get even with and punish Buchalter because he wrongly attributed his own shooting to Buchalter, and he began to plot and plan this case in 1940. I must repeat, it took him a long time to pick an act, and to pick the right actors. He had to pick someone from people who associated with Buchalter in his past life. He could not pick you, or me, or someone who did not know him. He knew his cue. When Tannenbaum is in the clutches of the law ready to burn for six murders he admitted out of his own mouth, Rubin says to him, "Tannenbaum, an associate of Buchalter, that fellow—he is my man—he has something to gain from the State, never mind the District Attorney—Tannenbaum, he is my man." I will speak of that in a few minutes.

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But in all the case there is still a flaw, and when he learns somehow, somewhere, some place, that Berger was the man who was responsible for fingering him when the bullet went through his head—you see, before that he had very little on Berger of any consequence—"He is my man—Berger is my man—June 5, 1941—I will complete the cast." I wonder what Rubin's face looked like when he learned that Paul Berger was the man who fingered him on two occasions? I wonder what he said to himself about Paul Berger— He who says on the stand, "I will help anybody," when I asked him about the financial transaction he had with Berger in 1938, when he says he had somebody named Ike Brown loan him \$200. He did not loan it, but he arranged it, or something like that. He defended Berger—he lunched with Berger—he tried to put him on the payroll of the expressmen's associa-

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tion. I wonder how he felt—he who was dealing with Berger in the presence of a police guard after he was shot, which was furnished him by Dewey. And now he is on the same team with Berger. I will illustrate how false and how rotten this Rubin frame-up is. Mr. Turkus said that the case was broken from the inside. Was it? Well, it was not framed from the inside—the case was broken from the outside by Rubin—it was not only broken, but in your presence, on this witness stand, by evidence they produced it was smashed and shattered and has fallen to pieces by its own weight. Rubin! I don't know how many people he in his lifetime has been able to fool. Again, I say, and don't misunderstand me, I in nowise justify any harm that came to Rubin. Nobody has a right to be shot or be hurt, or threatened, or intimidated. But that is not the point in this case now. There will come a day for whoever is responsible to answer that charge in the proper court, in the proper tribunal, before a proper Judge and a proper District Attorney, a Man soft-spoken in manner, but only for a while. You see, in the preparation of this case I read the flour record. This is not his first performance against Buchalter—this is his second performance against Buchalter. And, carefully reading the record, I practically knew what to anticipate from him. I said that here when he took possession of the court momentarily—he thought he was still on a box in Union Square—he forgot he was in the witness box, and the soft-spoken, mild-mannered Rubin rancored, and raved, and cursed, and hurled invectives. I said that I would not roll

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in the gutter with him. He admitted that he never saw me in his life—I don't care whether he did or did not—but I never saw that man in my life. I said it then. But that is not the point. I take it that he anticipated, if he took the witness stand, and made a remark about being shot, that he would gain the sympathy of the jury. Well, he is entitled to sympathy, but that has nothing to do as to judging his credibility in this case. You see, when Mr. Turkus had him on direct examination, carefully following his Grand Jury testimony, and actually prepared with questions and answers, he was asked concerning matters which were for my cross-examination. You see, if Mr. Turkus is going to beat me to the punch and show Mr. Rubin in his true light, it will not be effective. So I asked the same questions again, and so Mr. Turkus, when the Judge sustained him and not me, properly, Mr. Turkus said, "Well, I want to present Rubin in a true light." All right— Did he present Mr. Rubin in a true light on direct examination? You search your memories, gentlemen—he did not. There was no real true light on Mr. Rubin on direct examination. I will recall it to your attention from the record furnished—a matter of Rubin's participation in flour extortion—his own participation in extortions totaling \$400. to \$700. each and every week, and sometimes more. Was that brought out on direct examination? It was not an oversight. My able adversary does not commit those things as oversights. I will tell you what was in the mind of Rubin. He had an idea that perhaps—he is experienced with courts—do you remember when I said to him about flight in the flour case,

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he said, I spoke of a subject pertaining to the jurisdiction of New York? He was no stranger to these things. He is above the average intelligence. It was Rubin's thought, you see, that maybe in cross-examination I would not ask him about those things for fear that I may open the door and put the defendant Buchalter, by his answers—though I did it on behalf of putting the defendant Buchalter in a worse light than he appeared already. So you did not get Rubin in his true light, did you? I had to bring that out myself. Well, you have never seen Rubin in any true light, but some days, to quote Rubin himself, as to what he said to McCarthy in 1937, he said to McCarthy, "Hope for a break. It will come." And I say, "I hope for the break. It will come." And we shall see Rubin not in a discolored false light, but in his true light. We only have him partially here, and that is bad enough—this gentleman who said, lifting his hands, "With hands like these you cannot work, so you must use your mouth, and I use my mouth." He did all right—he did. You might think from his testimony, as he presented himself, that the defendant Buchalter made of him a union man, a racketeer, a gangster, an extortioner; that before he ever met Buchalter in 1927 he was lily-white. Why, gentlemen, from 1917, 1918, or 1919, until 1927, when he said he knew Buchalter from 1932, and he became intimate with Buchalter, according to his own language—let us look at him—Who is he—Is he a paragon of virtue, is he a clean man who was taken from a clean life and dipped in the mud by Buchalter? He did not fool me and I

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think he did not fool you. He knew Noya and Slobow; he knew who was interested in the unions—he was on all kinds of committees, finance, control, joint executive, and otherwise; he knew who was controlling and dominating the Amalgamated labor union. He knew who was betraying it up to 1927. He was willing to profit by it and live by it, and attend their meetings and associate with them, attend to their strikes. Nobody compelled him at the point of a gun to lead that kind of a life. He was not a cutter or a truck driver; he used strong-arm activities when he saw an easy dollar, and he saw what a free spender he could be by being a business agent on the executive board. How did he get into the union? He went into the bathrobe firm, did he? Well, by his own admission, he told you how much he knew about bathrobes before Berger gave him away. There were two ways, then, he said, to get into the union—one by being a member of the trade, and the second way was if you had underworld influence. And he denies that underworld influence got him into the union. So I pressed him with his testimony in the flour case, and what did he say in the flour case? He said there that Noya was instrumental in getting him into the union (page 1092 of flour record). No lily-white, Mr. Rubin. He knew who associated with it—he knew who dominated it—he knew the racketeers who controlled the union then. I know it is no excuse that Buchalter subsequently got in himself, but the point is Rubin. He is asking you to weigh his credibility. You must consider those things in weighing his credibility—what were his associates—who were

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they—did he know what they were doing? He could have, if he was a decent man, left that field and gone into other fields. He did not have to be a racketeer with them—not Rubin. He said in 1932, when Buchalter made mention of the fact that Luciano, or somebody, whoever it may have been, said, "This one has to go, this one has to stay." "All the business agents were to stay and were going to get a year's pay," what do you think the lily-white Rubin said? "What about me?" You see, who does he care about— "What about me, me me?" All his life. He did not retire—he did not go the way of decent people, and say, "Well, my hands are deep in filth." He wanted to stay—he loves it—he loves glamour—he loves the underworld—he loves the glamour of stuffing in his pocket \$400. to \$700.—he loves the tips, and they are pretty good. But men in the shops, men who drive trucks, men who don't get anywhere in the bosom, they are the victims of the street corner orator, the "American" Rubin, who says when he was a young man he was speaking on soap boxes in Union Square, espousing Marxian theories of economics— Rubin, who when called to the colors of his country, did not go. I say this most respectfully to his Honor when he referred to William Penn as a Quaker— William Penn was a Quaker— Max Rubin was a faker. It goes to his credibility whether or not when he registered, like all human beings had to then on behalf of their country—it goes to his credibility when he says that he was living with Mrs. Ada Coglein—married to her, and therefore was entitled to deferred classi-

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fection in 4-A. He hid behind the skirts of a woman in order to avoid service to his country. It goes to his credibility, I say, because he was not living with her, he was not supporting her. And she complained to the Government because no Coglein would stand for that Union Square loafer hiding behind her skirts and refusing to answer the call of his country. I can understand her make-up. She complains, and they reclassify him. But Union Square—still anchored himself to Union Square—he would not go even when called, the cowardly Marxian theory— I have another name for it. He betrayed labor, he betrayed his wife, he betrayed the country that harbored and kept him and gave him a chance to earn a livelihood. It was not a mere accident—it was not just foolishness on his part.

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I do not bring this out to prejudice you, gentlemen, against him, but I dare say when a man betrays the flag under which he lives you have a right to believe him or disbelieve him, and to consider that in accepting or rejecting his testimony. If it was a plain scheme on his part to avoid service to his country, it is indicated, not as an accident, but as a plain scheme. I don't know the reason why he went to Germany, and I don't care, but he forged, knowingly, his brother's name; he swore, knowingly, that his name was Benjamin Rubin, and he lived there under that name—and he did it for one purpose, that is clear—to avoid detection and arrest and possible prosecution by the Federal Government. There, in Germany, he still engages in the transmission of money to the Soviet Government—that Soviet blood which flows within Rubin so con-

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spicuously that even when he is hiding in 1936 or 1937, whenever it was, in Brooklyn, he had to assume a name—he adopted an unpronounceable Russian name. He cannot get away from his early ideals and from his early ideas. He calls it Marxian economics, but I have another name for it. The Rubins don't fool me, gentlemen. His history itself is a reason for doubt. Let the workmen work, he lives while he talks; let American soldiers die—he still hides— That is Rubin.

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In 1927 he disassociates himself from the Cutters' Union. He will have you believe that Sneaky Levine—Red Levine—who was brought here and put on the stand, in the custody of the Sheriff, or somebody, and who was put on the stand, voluntarily gave up being a business agent and went back to driving a truck with his hands and feet and body, and dirty himself, so that Rubin should become business agent. But he was not satisfied yet with being a business agent of one local, 240; there soon came a time when Local 138 began, and that was \$25. a week more, and with the tips and all, I must repeat, would average \$400. and \$700. a week, and some weeks more. He was an active participant. He was never arrested on the charge—he was never brought up on the charge—he was never punished for the charge—and he never will be punished for the charge. But you have a right to consider his motive on the kind of testimony that he wants you to consider as the Gospel truth. And even after Thomas E. Dewey was appointed in 1935, he continued to participate and shake down firms, and even when he fled from Dewey—

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and I say from no other place—before he fled his pal Berger, the fingerman Berger, was taken around by him and introduced to prospective victims of a shakedown. It is no defense when they say that was done at Buchalter's command or suggestion. They could have quit whenever they wanted to. But the fact is that he paid his penalty and they are on the streets free, unharmed, protected by your money—that is the Rubins and the Bergers who live at hotels and spend their summers at the Half Moon.

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You have to consider those things when you consider the truth or falsity of their testimony. Now, let us get down to the stoppage. You see, Rubin is no fool altogether—he is a Jekyll and Hyde. There are times when he has to tell the truth; he cannot help it. He talks about stoppage. There was a stoppage and he cannot deny it. But who called it? Who do you think would call a stoppage? The stoppage was not called for Rosen—the stoppage was not called for the benefit of any one person or any individual person. The Court has told you that stoppage is a lawful means used by unions, and it is used now. So there are things that he tells you about stoppage which have to be true. He says that he told Buchalter, when discussing the stoppage, that he anticipated trouble with some, and he mentioned who they were, one of which was the Branch Storage. And he leads you to believe that Buchalter was interested financially in the Branch Storage to have you men draw the conclusion that Buchalter, although an officer, did not favor his own company—that he did not have the power—that even Mr. Buchalter did

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not have the power to eliminate his own concern from this stoppage. I have gone over the facts with you as to what happened in the Svirskey place once before, and I shall not repeat it again. But he gives a very interesting side-light which has a bearing upon this case. You see, he wanted to convey the impression to you what a kindly soul he was—he who had the right and the power to place workmen here and there and shift them from one place to another place. And he had a right to anticipate, “Well, you as business agents of this local, couldn’t you have placed Rosen some place else yourself?” And so he says, “Yes, I tried—not only I tried but Buchalter tried; we went to dozens of places; we went through the entire industry, because unemployment was not a problem with respect to truck drivers in those days.” But what is the matter? Why is it that Rosen is discriminated against? Why is it? Rubin gave you the answer. He said, “If you want me to amplify it—Rosen was considered a chiseler.”

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Now, gentlemen, don’t mistake me, I am not disparaging the victim of a vicious murder. I am merely telling you Rubin’s language describing Rosen, for the purpose of convincing you that if Rosen was out of employment it had nothing to do with Buchalter. As a matter of fact, he had all to do with himself, despite Buchalter’s efforts wherever he went. Rubin says he was unsuccessful. Was there any reason lest somebody believe Buchalter was the one responsible for him not even having bread in his mouth? Rubin says, at page 1468, that Rosen was a chiseler, and, “If you want me to amplify

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it, he would go to a tailor shop and he would take \$25. from the tailor and he would promise to get him some work, and he would not get him any work; and he would go to a manufacturer and he would take a suit of clothes and he would promise to pay and he would not pay—just petty larceny stuff—Joe Rosen had that reputation.”

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That was the reason the trucking industry refused to re-employ Rosen. In the name of Heaven, gentlemen, Buchalter was not responsible for that condition, if people in the trade did not want Rosen after all the efforts made in his behalf. This was before Dewey, mind you. Don't let it be urged that this was a matter of appeasement—this was before Dewey. He could not work. Maybe Cooper was right when he said, “Rosen bit the hand that fed him.” I don't know. And even after Larry Cooper gave him employment, there was difficulty. Cranes was working—Larry Cooper could not fire Cranes. Cranes had to be looked after. And again Buchalter is called in, and spoke to Mr. Cooper—“If you don't want Rosen, don't take Rosen, but take Cranes. Rosen is going to work.” He quits that job of his own accord. That was not Buchalter's doings.

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Now we come to the very crux of this case. I will skip things here but I will come back to them later, but in the order of my plan, I say we now come to the crux of this case. That is the statement which Rubin made to Mr. McCarthy. What a document! What truth there is in that statement which is consonant with the evidence here. Bernstein not mentioning Lepke's name once, not even repeating the conversation

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that others mentioned. And a document given after Rubin was shot, not before—after; according to Mr. Turkus, Lepke is on the loose, that is Mr. Turkus said, or on the “lam”, I don’t know which—a fugitive from everybody. And when I say “everybody”, I mean everybody in Manhattan, because the evidence is positively silent and clear that no one in Brooklyn ever looked for him in this case. Where is that statement made? If you are going to consider whether it is true or not—he admits having made it, but now he comes with his answer, “It is a lie because I was shot.” I am not quoting his exact language. You remember it. The Judge allowed the question to be put in a certain way, and I am giving you the substance of it—“It is a lie because I was shot.” I took it that Rubin believed, when he was shot, that Buchalter was responsible for his plight. He said he rolled in the gutter with a bullet, or something like that. He was vicious; he was vengeful; he had already testified against Buchalter, and he says to you that is the reason he was shot. His testimony was irrevocable before the Grand Jury. His own lawyer, Maguire, took him to Dewey, not to Brooklyn. He took him there and he gave his testimony under oath. And he was under police protection—he was at the hospital—he was shot. I can just imagine how he hated Buchalter, and he was right in hating him if it were true. He would lie then—surely, he would, but not in favor of Buchalter. He would lie his head off against Buchalter. He would tell every contemptible lie he could possibly think of to pour forth his hatred and vengeance against a man whom he

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supposedly thought was responsible for his plight. He would not lie in favor of Buchalter—He was afraid—afraid of what? If he was afraid that Buchalter would personally shoot him, he had a bad guess, because there were racketeers then, but he does not implicate—he does not try to infer, rather, that he would do it personally—he would do it through his agents, because he had a gang. It is so easy to get rid of a man who would involve Buchalter in the Rosen case—Berger, number one; Tannenbaum, number two—two gunmen off the streets, actually where they belonged, might poison his supper—with them out of the way I have something on them. Oh, no, because they were no part or parcel of this case. He had nothing on Berger then, he had nothing on Tannenbaum then. Only when he found he had them in the groove, then he suggested to turn voices into the perjury you heard on this witness stand. Why, he saw Berger in 1938—he saw him in the street—he was protected by police—he tells us the police would stand aside while he talks to Berger. The evidence is replete with proof that this same Berger attempted to induce Rubin to give false testimony against a Dewey assistant, and to threaten him with violence if he failed to do so. Berger was arrested for that and was in the “can”. That was the time then to look him up for the Rosen case. He did not do it because that charge then was insignificant—it was a misdemeanor—and he could not put sufficient pressure upon Mr. Berger then; so he waits until Berger is in a pretty sad plight himself—in 1941—and then he implicates him. Nobody else does. He saw Tannenbaum in the

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Federal Grand Jury in Manhattan when he, Mr. Rubin, was under policy guard, and Tannenbaum was a witness there alone and unattended. Well, Mr. Tannenbaum is grabbed and thrown into jail. And with a little bit of luck he is out of the way—my person becomes more safe. He was afraid, was he? Let us see? Did he have confidence in the people who were in that room? You remember who they were—Dewey's officer. He said he had great faith in him after he met him, though not before. He did not even have faith in Dewey before he met him, because he said, "How could you have faith in a man before you meet him?" He would not have faith in him until there was a personal introduction and he personally saw and supervised his work—then he had faith in Dewey, but not before. It was Frank Hogan, then, who joined the assemblage. He was liked so much that everybody wanted him as District Attorney, and he had no opposition. That was the same Hogan, the same Hogan in whom Rubin had such faith, the same Hogan to whom he was taken by Mr. Maguire when he testified against Lepke. Then there was a policeman by the name of Giordano, a member of the Police Department, unattached to the District Attorney—a member of the Homicide Squad; there was a stenographer there, and there was testimony against Lepke there and there was testimony against Lepke in the flour case, because the other cases had already been in. He was under guard. He was not under physical restraint. And then Brother McCarthy—the same McCarthy who put such a scare into Mr. Buchalter, or Lepke, or whatever you want to

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call him, that he said, "This McCarthy is going around, he is going to make a big collar, he is going to catch big fish, get out of town." The same McCarthy, the same McCarthy who begs him—offers him immunity; the same McCarthy who is faced with the situation that Mr. Turkus revealed in his opening. There was no clue—there were no fingerprints—there were no witnesses—What can I do? But maybe you, Rubin, you can tell me, you can help me. We want to solve this case. The same McCarthy who frightened Buchalter to the point where later he claims—and I don't say it is true—that, "McCarthy is going to be pushed out of the case—" I suppose because of some innuendo against him—"but McCarthy is going to be pushed out of the case." I don't know who could do the pushing.

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Well, I don't want to say anything more about that. But I tell you that Rubin was under all the atmosphere in the world wherein he could, if he had any truth to tell, have told the truth. And he did tell the truth because he had confidence in everyone. Now, let us see. If, out of fear of Lepke, or Buchalter, McCarthy was lied to by Rubin, I take it he had so much faith and regard and respect for Hogan, that as soon as McCarthy left he would have said to Hogan, "You don't think I am going to tell him." Possibly, and this is an inference, gentlemen—it is a logical inference that I draw from this—you can accept it—you may draw the same inference and you may not. He would have said something to the eminent Mr. Hogan out of his own self-respect, like, "I am afraid of Lepke. That is why I told this fellow a lot of lies."

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Well, if that was so, you would have had the great pleasure of seeing Mr. Hogan here. I take it, it did not happen. Let us go into the statement to decide then whether or not he had the opportunity to tell the truth. As the Court commented, after seeing the statement, "The witness failed—" in the statement I am speaking of—"in any way to implicate Lepke; on the other hand, he went out of his way to give assurance that if he could, he would." That is the Court's interpretation of the contents of that statement to McCarthy in the presence of Mr. Hogan and a stenographer.

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Gentlemen, is there any reason for doubt? If there is no other reason for doubt, and I say there is, here it is— Vengeful, spiteful, hateful, Rubin, he goes out of his way to say, "If I could, I would." But he did not. Afraid of Lepke? He already had every reason in the world to be afraid of him, if what he had in mind was being afraid of the false testimony in Brooklyn and of afraid of the testimony in Manhattan. He, under guard, afraid of him? If he was afraid of him, he would have been in a hotel—he would have made known his position—he would have made known his fear, he would have made known his thoughts, he would have told Hogan, or someone in Mr. Dewey's office. But, no, he does not. He never made any attempt to go across the Bridge in the custody of guards and walk into the office of the District Attorney himself. Oh, no, he does not. Let us see what McCarthy was there for. He says, "You know you were at the store of Rosen. We don't want to prosecute you. The fact you

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were at Rosen's store is already known to the Grand Jury. Even if you are involved, we are not going to prosecute you." In other words, McCarthy, uncertain then whether Rubin was involved or not, says, "It is not you—" by implication he says—"we don't want you. You are just Rubin, the small fry. We want the man responsible for this, the man behind this, the Lepkes, the Gurrahs, and nobody else." That is what Mr. McCarthy infers to Rubin.

10835 "We don't want you. We will give you immunity." He rejects it—he rejects it. Then, as to the store— "I was only over to the store once, and that was on the invitation of Louis Feinberg." Well, that is what he testified to here, so that is not a lie to McCarthy, is it? That is the truth. He was in the store once. He said so to McCarthy in 1937 and he said so here. The evidence bears him out. And so, you see, the first statement is not a lie to McCarthy. He said, "I went to see Joseph Rosen once, a little girl came in and out." That is the truth, isn't it? That is his testimony here.

10833 He had a talk with Rosen for about three-quarters of an hour. That is the truth—he did not lie to McCarthy, did he, that Rosen complained about business? Isn't that the truth? Everybody says so, that he complained about his candy store business. And Rubin said that he said to Rosen, "You had no right to quit the job without letting me know." That is true, isn't it, gentlemen? Isn't that the testimony? That is not a lie to McCarthy. And McCarthy said, "Quit what job?" And Rubin said he was working for Larry Cooper. That is the

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truth, isn't it? There is no lie to McCarthy there. He was working for Larry Cooper. McCarthy said—you see, there being two Coopers— “You mean that is the fellow from New Jersey?”—meaning Cooper from the Garfield, I take it—and Rubin said, “No, that is not the Cooper. This Cooper has a brother in the Homicide Squad. That is a Brooklyn Cooper.” That was true, wasn't it? So, he did not lie to McCarthy, did he? Rosen had jumped off this job without letting anybody know—he quit of his own accord. That was the truth—he did not lie to McCarthy. Rubin said to McCarthy that Rosen told him he had heart trouble and that was why he left the job. That is what the testimony here is. So, you see, he did not lie to McCarthy. And Rosen said, “I want to go in another business.” That was the truth, wasn't it? That was not lying to McCarthy. Rubin told McCarthy he was a business agent for Local 240. That was not a lie, was it? That was the truth. And he said he did not see Rosen from the day when he saw him with Feinberg until he read he was shot. Isn't that the truth, gentlemen? There is no lying to McCarthy there. McCarthy said to him, “Didn't you leave town?” And Rubin said to him, “Yes, some time in November,” and then he volunteered himself, “But not on account of that.” That was the truth, gentlemen, wasn't it?

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I am struggling in this case to prove to you that he had no reason to flee from Brooklyn, but he did have lots of reasons to flee from Dewey in Manhattan, because there he was a participant in extortion. So that is the truth. And I will

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show you how that is the truth, that he fled not from Brooklyn but from New York. Then he said to McCarthy, "Yes, but not on account of that." That is something he volunteered. It speaks eloquently, gentlemen, in favor of the defendant. McCarthy said to him, "Did you know Lepke and Gurrah?", and he said, "Yes, very well." Well, that is the truth, isn't it? I am going sentence by sentence. He did not lie to McCarthy, did he? He denies he told Rosen to leave town, or that he gave him any money to go away with, except fives or tens. That is exactly what I have been trying to prove throughout. Why should Rosen be sent away? What for? What could he do? What could he say? What harm did Buchalter do? What penalty could he suffer? And he denies he told Rosen to leave town. Then he was asked, "Don't you know anything about the Rosen murder at all?", and he said, "No." Now, he wants you to believe that sentence is a lie. Of course, he did not know about the Rosen murder, because, listen to this, gentlemen, listen to what McCarthy offered him—"I am giving you immunity." Rubin said, "I don't need immunity. I was never taken into anybody's business or confidence, rather, on any murder case—that was always one thing." That is the truth. That is the truth, gentlemen. He doesn't know anything about the Rosen murder; he doesn't want immunity, because he doesn't need immunity. He said himself he did nothing in the Rosen store; he did not threaten or intimidate; he did not do anything for which he had to worry about, or pay the penalty for. And his explanation of why did you say so much, he said, "I was afraid

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some District Attorney may frame me." Now he has the District Attorney framing him. He said, "District Attorney, District Attorney, District Attorney," they were framing me. Gentlemen, District Attorneys framing Rubin! You know in a desperate situation here I would not dare charge that anybody from the District Attorney's office would try to frame my client. And the District Attorney would "frame" Rubin! Then McCarthy said to him, "Tell me, is there anything else you want to say?" That gave him carte blanche to say anything. You know there is a stenographer there, there is Mr. Hogan there, there is a policeman there, a perfect record is being made. "Tell me, is there anything else?" Here is Rubin, who had every motive in the world then to get every witness in the case off the street, the Tannenbaums, the Bergers, if they were part of this case, and he says, "All you got to do with me is pray for a break—it will come—and if I can be of any help, and if you find that my story deviates one bit from what I told you, you can do what you want." He challenges the District Attorney, "If I deviate one single moment from the truth, you can do what you want, and you will find in the long run we will get many of them." Well, now, Lepke, he knew him, but I don't care what "them" means, it does not mean Buchalter and it does not mean Lepke. He would have said so, this vengeful, hateful, spiteful person, when he was in the presence of his best friend, Hogan, and he passes the remark and says, "You will see more of the cop in me today than any cop in the department." You see, he had been shot,

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he is with the law now—he is apparently imagining himself that some assurance will be given him that he will not be prosecuted, and he says, “You will find a better cop in me than any one on the force.” And the Court commented at the conclusion of reading this: “The witness failed in any wise to implicate Lepke; on the other hand he went out of his way to give assurance that if he could, he would.”

10847 I say, gentlemen, the case was not broken from the inside but from the outside. This document establishes the truth of our defense. It is the finest, unsurmountable reason for doubt, sane, reasonable, logical, and flows from the evidence, and in every speech. I don't want any sympathy for this man, but I want justice. I want a fair day in a fair court for him. I do not care what else he did, or where else he is going to be, or what else is going to be done to him. This is my cause. Now, you can see why I say this is my cause. I cannot let this go unchallenged without saying the crux of the case is Rubin here, when he had every reason and opportunity offered him, saying, “I was afraid of Lepke.”

10848 He was not afraid of the damage he had done in New York. He was not afraid of his sworn testimony he gave in New York. He was not afraid when he swore positively in the flour case and he said nothing about Tannenbaum and nothing about Berger, on June 5, 1941. That is the Rubin who offers himself as a witness in a murder case.

(At this point, at the request of Mr. Barshay, a recess of five minutes was taken, the Court and the jury remaining in the court room.)

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Mr. Barshay (Continuing): Another point, gentlemen, on this Rubin. You remember one occasion about September 11, 1936, his own words were, "I remember that day vividly." That is his adjective, "vividly". In other words, the whole day is brought to his mind. If a man remembers that fact vividly, he ought to remember what he does especially with respect to that portion of the day. This man, whose memory is so vivid that he went to get Berger—I don't want any mistake about it—at the Expressmen's Association on 17th Street—he, who remembers it vividly, and knows exactly where he went to get Berger, at the Expressmen's Association on 17th Street— You have heard what Berger said. Apparently, he had no business at the Expressmen's Association. He did have business at the Clothing Cutters' Union. You remember Berger saying, "I went to Weinstein's Friday night, the fellows played cards, before I go home, at the Clothing Cutters' Union—" blocks away. Someone is lying. That is what we get, gentlemen, when a man fabricates a story in 1940 when he puts the characters in the cast here and the location there. You cannot crush the truth, no matter who you are.

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Do you remember on direct examination Mr. Rubin being led through by Mr. Turkus very skillfully about the vivid recollection of September 11th—"Who was there when you had this so-called talk with Buchalter—description of dictaphones, office help, and all that—who was there?" He did not say a word about Tannenbaum in the direct examination, not a word. I had to draw it out of him on cross examination.

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He had hoped to God that it was never brought out, because he was on the spot. He remembers that so vividly, such an important conversation, the inception of a proposed murder which was to take place, where he is simply to participate, willingly or unwillingly, knowingly or unknowingly, he forgets about Tannenbaum altogether in the direct examination. Remember, here he said he was fleeing from the Rosen case. Oh, what a job I had with him. I guess you needed a Steuer to handle him on that point. In New York, the same flight from Dewey; in Brooklyn, the same flight from Brooklyn. If he testified tomorrow somewhere else in some other charge against Buchalter, you can guarantee then the same thing, that it will be a flight from some place else. A movable foundation—you cannot anchor Max Rubin. And how positively he claimed here he ran from the Rosen case and not from the Dewey investigation at first, and then later when he saw his mistake, he said, "From both". Is he cute? But before he had a chance to be cute, I cornered him through a prior sworn contradictory statement, when I quoted from the flour record, "Then the lawyer asked you, and I believe you testified that that was to avoid being questioned by Mr. Dewey, or his staff," referring about his, Rubin's flight, and he said, "That is right." And then later on in the same record he changed and said that Lepke told him to go away. "Did you testify here that he told you to go away on account of the Dewey investigation? A. That is right." So, you see, we have a little luck. In some places

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he is anchored, but when you get him anchored finally, he has got to say, "That is right."

In Washington, in March of 1937, which is the last day he saw Buchalter in the hotel, in the bathroom, Buchalter said to him then, he claims, "If you get into any trouble in New York, don't come to me." At that time the evidence is clear that not a soul in the world from Brooklyn was looking for Rubin—that is his own testimony. He is at his home when he comes in—he is at the office when he comes in—in no place is there word left for him that anybody from Brooklyn is looking for him. Why flee? Why flee when your existence is not even known?

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New York—there is no explanation that it meant New York State or the New York metropolitan area. It meant, "New York", the very place where Mr. Rubin was committing his crime. I did not impute to him any wrongdoing in the Rosen case, but his own conscience was bothering him and he did not like the way I was questioning him, and he laughed at me and he said, "Maybe your conscience is bothering you—" when my whole proof in the case is he did not know anything about the Rosen case. Why should I try to implicate him when I know that a statement is in existence exonerating him? But I did not know his own mind bothered him. He fled from New York—he fled from Dewey—he fled from Manhattan—the only place in the world he had reason to flee from. And all of a sudden I said to him, "Did you ever tell anyone that you were fleeing from Brooklyn?" He said, "No." Because Berger was trapped, he said that Rubin told him that the D.A.'s office in

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Brooklyn and the Police Department were looking for him. And the Judge said to him, "Was the Rosen case mentioned specifically," and Berger fell into the trap—I don't say intentionally—and he said, "Yes, the Rosen case was mentioned by Rubin or Buchalter, or both—" to Berger. What a lie! They were not looking for him, and when finally the Police Department did come to his home it was a Dewey man—a Dewey man—not anyone from Brooklyn, not because they wanted to spare him, not because he was a favorite citizen—oh, no. They were looking for anyone and everyone in the solution of this case through a force other than fingerprints or clues. But he did not figure in the case, and that is why I say his statement to McCarthy is true—that they did not let him in on anything—"I don't know anything about the Rosen case. I fled, but not from that case." And the best proof of all is that when he finally surrenders, he, who now claims he fled from the Rosen case—when he finally surrenders through his own lawyer, to whom does he surrender? He surrenders to Dewey's office—the only office that is looking for him—the only office from which he fled.

10860 I know it is desperate; I know the attempt will be made to show you that inducement of flight is evidence of consciousness of guilt. The Court will have something to say about that, and, if there is any doubt in your minds, gentlemen, from where he fled, you must resolve that doubt in favor of the defendant. You were told that when you were chosen. When the proof of any fact is at issue, you can interpret it in two ways. But I will let the Court tell you about that, but I say to you, gentlemen, you have to

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apply that rule here because he fled from the only place where he himself committed a crime and he surrendered to the only place where he himself committed a crime; and so the evidence of inducement of flight is hardly believable.

Another thing about Mr. Rubin, he wants to add, on and on and on—six feet deep is not enough for him. There is a lot of evidence or testimony in the flour case that I want to make reference to. He said that when he left Maguire's office—in the hallway, mind you—after he left Maguire's hallway—he would have you believe that Buchalter would say: "I did not want to tell you this in front of Maguire, but you have nothing to worry about. The case in Brooklyn is to be thrown out of the window." What case? What case is to be thrown out of the window? What window—what case? Mr. Turkus himself told you there was no clue, no identification, no witnesses. What case was to be thrown out of the window? What window could it be thrown out of? The Grand Jury was investigating the matter—the likes of Rubin and the lack of corroboration—or the truth, whichever way you may term it, of the Rosen family. What could they proceed on? The case is going to be thrown out of the window! Then he gives McCarthy another boost—McCarthy is not going to take care of it any more. In other words, Jacobs is going to be put in, and Jacobs is going to be "pushed". And somewhere else, in another building, the case will die. Well, you are speaking of a big man when you are speaking of Ralph Jacobs, the second assistant in the office. There was only one man above him. No Rubin will dare to attack the integrity of that

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man—not if I have a mouth, or the strength, or an ounce of strength in me. That is Rubin, gentlemen. But in the flour case, the same conversation in the same hallway, the same hallway, the same building, here is what he said—at page 967—“Buchalter,” said he, “told me—he told me I have nothing to worry about, everything would be O.K., and I should trust him.” He was asked further, “Anything else that you can remember?”, and he said, “That is all.” That is the time, I believe, he made the explanation that if something was asked about the Rosen case the lawyer for Buchalter would move for a mistrial. He knows what the lawyer would do! Maybe he would, maybe he would not. But the point is, “That is all I can remember—that is all.” Now, that he wants to make “flight” a part of this case and dig a little deeper against Buchalter, he gives us an amplified, confounded, lying statement. But even if he said what Rubin claims he said, “Brooklyn is O.K.,” why did he run away from Brooklyn if he believed Lepke? I say that there you have him. You have him because you are dealing with a man who has vengeance and hatred which knows no bounds. He is not satisfied with the incarceration of the defendant—maybe he wants to smell the burning flesh. But that care is not Rubin’s care, or my care, or any person’s care—the State seeks no vengeance—the State seeks simply justice—that is what the State wants.

The District Attorney will answer me in a lot of things I say, but it will be his interpretation, his personal interpretation, and not out of the evidence. Is there a reasonable doubt, gentlemen? I shall take but a minute with the testi-

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mony of Mr. Maguire, the lawyer. Do you expect a lawyer to advise a fellow to flee? Do you remember the statement, "If there are no witnesses, there are no investigations"? Well, how about Sylvia Rosen? She is here, isn't she, a witness? Nobody asked her to leave; there is no evidence of that; she is a witness at the very inception of this whole scheme. There was no effort made to get her out of town—no effort to buy her off—no effort to intimidate or threaten her. "No witnesses, no investigation!" Finally, they stretch the word "investigation" in a manner that would lead you to believe that perhaps Rubin fled from two investigations. Well, that is stretching it quite a bit. You see, Dewey was beginning lots of investigations—the flour, in which he was connected; crimes in which he was connected; and this, in which he was connected. They were under lots of investigations. Rubin was involved definitely in the flour case—that is out of his own mouth. Maguire said, when Buchalter was up there—and he never saw him before— Buchalter was up there, and when Rosen was not even mentioned in the conversation between Rubin and Maguire, there was not a word about it. He said the Rosen case may have been talked of in passing, evidently a remark like, "I read in the paper something about the Rosen case. He was formerly a member of the union—" something which you might read would be passed upon by men in the same trade. But a lawyer like Mr. Maguire, I don't think he came hereto lie—by no means—not by a long shot, do I impute the integrity of any witness like that. But we had him in court because, in the flour case, he gave testimony. You

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see, he knew of the Dewey investigation. Where his office was, that is where the business was, but with the Rosen case he said he only assumed—"only assumed", that is his language. "Q. Well, then, Mr. Maguire," this is in the flour case, "you don't know what investigations were pending, do you, Mr. Maguire!", and his answer is, as plain as day, "I know that the Dewey investigation was pending then." But not a word like "Rosen" in the answer—not a word like "Rosen" in the answer. The next question put to him was: "How about the investigation in Brooklyn, in connection with the Rosen shooting!", and the Court made this comment, addressing Mr. Kleinman, who was the lawyer then for Buchalter, "He just said he did not know." Of course, he did not. You see, the Rosen investigation was all over the newspapers. It just happened that Dewey was hammering away, getting closer, and closer and closer, and snatching these men in the net, and Rubin was there with him and could be used against them, and he bought his freedom by turning State's evidence.

10871 We are not concerned with that case.

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Now, we have the actor, Paul Berger. He is a fine gentleman, Berger, the cutter. Well, he was a cutter—he was not only a cloth cutter, he was a face cutter—one of the best. When he boasted of his cutting ability, I don't know what he was passing out—whether face cutting or clothing cutting, but he sure was a cutter, and he knew the gangsters, and the guerrillas, and the strong-arm men long before Buchalter appeared on the scene, long before he was with the union, since 1917. He acted as a strong-arm man—he was in the International strike in 1925

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—he was on the trolley car with six others when they cut Mr. Johnson in the Borough of Brooklyn. They went to his home, they followed him—he should not go to his place because he did not go out on strike. That is a year or two years, at least, before he said he knew Buchalter. He was the slugger. There was no corruption of Berger by the defendant Buchalter. I take it he is a whole lot older than him. He had a varied career, all right. I asked him about the assaults and beatings and sluggings, and he said, “If it is in the book, it is there, don’t go uptown, downtown, if it is there.” He took possession of this court—this 1941 witness—who never hid, or concealed himself, or disguised himself, or used any alias while living here. The only alias he used was when arrested. And even after Buchalter was convicted he was around, even after Mr. Rubin saw Mr. O’Dwyer and Mr. McDermott and Mr. Turkus he was around. Why didn’t they pick him up, such a vital and important witness in the case? Did Rubin lose his memory? Oh, no. Again I repeat—afterwards he learned that Berger was the fingerman, and he said, “He is, is he? Well, I am surprised.” Then Berger, who asserted his constitutional rights and waived them and re-asserted them—this same Berger, who never was in trouble, he sent to the union—always the union—for money, for compensation for the lawyers, when he is arrested in this case. He sends for the union. Well, let the union be responsible for him. He did not send for Buchalter. There is no obligation on the part of Buchalter to him. His friend is the union. Damn the union—what do we care for the union? Let them answer—let

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the Weinstains and the Katzs, and all the other officers of the union answer for that. You are not going to make him the goat for the union—not in a court of justice, anyway.

10877 So this Mr. Berger casts a slur upon his Jewish people. A fine defender of the Jewish people is Berger. There he is around—nobody picks him up—Berger, the man who holds an interest in a firm which has a Government contract, drawing \$150. a week. I dare say that has a bearing in this case when you have the likes of him drawing \$150. a week, living in a hotel—Berger—driving a car at the hotel. Again, I say, it is not my business how the District Attorney treats witnesses, but are you going to allow a murderer to be at the wheel of an automobile driving through the city streets with detectives in his car—detectives, honest, fine detectives, subject to the whim of a man like Berger? Well, maybe that has induced him to give false testimony. You may say to yourselves, "Why does Berger implicate himself?" What has he got to lose, gentlemen? He is smart—his lawyer sat in the box—his lawyer was always in the box—when he was arrested by Dewey away back in 1937, he was in the box then. Sending to Weinstein for money. He got immunity. You cannot touch him any more. He is free—as free as anyone from this charge. He would not sign any waiver of immunity—not Berger, with his lawyer in the box. There is no worry that he will be responsible for the assault with intent to kill upon Rubin, on the second attack. Do you think he is going in the Grand Jury, waiving immunity and subjecting himself to prosecution? Not Berger, gentlemen. He seeks nothing—he just

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lives at the hotel, drawing \$150. a week. As for income tax, you and I pay it, but not him. This alien, who thinks he is a citizen! Well, I guess if you are on the District Attorney's side, you can do lots of things, from the mere drawing of \$150., getting yourself immunity, asserting your constitutional rights, and I gather he will be there on the witness stand before Dewey and he will have immunity before he utters a word of testimony.

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Of course, they begin to agree on this. This Berger, who had the audacity to say to Judge Talley, "You are ridiculous." To such a fine man, a man of such high integrity as Judge Talley, who has to stand there and take the "advice" of a Berger. "Ridiculous," he said to him. Upon that testimony, gentlemen, you are asked to believe the defendant to be guilty beyond a reasonable doubt. Well, he definitely says that he was with Weinstein of the Cutters' Union, he was not at the Expressmen's Association. But that man even wants to volunteer more than is asked of him. Not again do we get a bit of truth. The Judge asked him, "Did Rubin ever say they were looking for him because of the Rosen case, specifically using the name Rosen?", and the witness, "He did." He did. Well, gentlemen, there are all kinds of truths from all kinds of people—there are all kinds of standards, but we trust to your intellect and to your honesty, we trust that you will keep your promise that you owe no duty to the District Attorney, no duty to the defendant, no duty to anybody, except to render a verdict that reflects the truth. Truth spouting forth from the character of a witness I have just described!

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10882 *Summation on Behalf of Defendant Buchalter*

Rubin, who knows that Berger participated in this September 5, 1936, discussion with him in the presence of cops? Was that the truth? Berger, who says on the stand, when he is asked, "Did you pay the \$200. to Rubin?"— "What proof have I—what proof has he got that I owe it to him?" That is the kind of a fellow Berger is, Berger who induces this very Rubin to say that the Dewey assistant made him swear falsely in a case where he was a defendant! Truth! I ask you to consider whether or not that sort of testimony is polluted. You said you would, and I have faith that you will. I think those are reasons for doubt.

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And now we have the final character in this drama, created, written, produced, prepared by the Marxian, Rubin—Tannenbaum—Mr. Tannenbaum—the little Caesar. Never have I seen in a court room, and I spent twelve years in this very court room prosecuting cases, a little Caesar. Where do these men get their clothes? How well dressed they are! How well groomed and well mannered, how soft spoken? Where has all this training come from? Where do they acquire these manners? At the Half Moon Hotel? "Yes, sir," "Yes, sir," "No, sir," "No, sir," cavorting around places like the hotel? What is this business? Who do you think they are fooling—these murderers? Who? Where do they get these newly acquired clothes, manners and speech? In the street, if they passed you and tackled you, they would leave you half dead before they stopped. Little Caesar—Mr. Tannenbaum—the 1940 vintage. He sees Rubin in the Grand Jury, outside—"Hello, Max." "Hello, Allie." The fellow who was in the room when he heard the

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murder being plotted, but says nothing. But when Rubin hears that Tannenbaum is up in Sullivan County awaiting a murder charge, and when Rubin feels that the back seat of Tannenbaum is being readied for the electric current—Allie, he says, is an associate of Lepke, and I will get him—he will talk as I tell him now that he has turned State's evidence. Who is this Tannenbaum—a Brownsville guerrilla, used before he knew the defendant Buchalter—used before. Yes, he knew the Shapiro brothers—he knew about the gang, as to who was to predominate in the Brownsville section—Abe Reles or the Shapiros. "But he had no part in it!" Not he—he was an honest, clean, working boy, helping his father in the hotel up in Loch Sheldrake Country Club. No less—the Loch Sheldrake Country Club. And long before the defendant comes up there, a lot of gentlemen are there, so-called "guests", in the Loch Sheldrake Country Club—gentlemen who take a seashore dip in the afternoon and summer at the Loch Sheldrake Country Club. It was a burial ground for Mr. Tannenbaum's victims. That is all it was. It is not a "country club"—it is a large unlicensed cemetery. And that is from his own mouth.

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He is arrested after he comes from Florida, he getting his \$100. while the defendant, whom he claims was sending it to him, is already in prison. Rubin has already spilled his guts to the District Attorney, McCarthy, and this fellow sending money. Well, he is around all the time and he is arrested by the Dewey office, and you know the procedure they go through. He is questioned and questioned; he is asserting his constitutional rights. Sure, he has rights, too—the likes of him

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are entitled to constitutional rights—I must say that. But why, we want to know, was he ever questioned and given a chance to assert his constitutional rights with respect to the Rosen case? I don't care about any other case. But, oh, no, not one word, not one word was put to him in March of 1940, or in April of 1940, or in the early part of May, 1940, long after Rubin had already made his statement—not one word was put to him about the Rosen case until the second Sunday in May, after he pleaded not guilty and signed an affidavit. “Who, me?” “I am not a murderer—I don't know nothing about murders—not me—I am innocent. I can prove it.” I will talk about that in a minute or two. This Mr. Little Caesar Tannenbaum takes active participation in this trial. “I take orders from the mob,” or something like that. Well, but there is a way of looking up things, gentlemen, in the public records, and to confront those gentlemen who took the stand who want to try to blame everything on Buchalter. “He is in the hoosegow anyway, let's give it to him.”

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Now, let's see about him. There is a little matter that he attended to on his own, with a gun, on his own, when he took a man whom he knew as Alfred Eisenberg and with a loaded gun robbed him. He admitted it here. But, apparently, the victim did not want to be a further victim, and so there was no jail for Mr. Tannenbaum. You cannot charge it to him. Well, now, the Shapiros—maybe he learned it from them. I don't know. This same Mr. Tannenbaum, who goes up to a summer resort and works for his father during the summer, and he says again

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and again that the guerrillas came up there and spent a lot of money, and he is attracted by it. Nobody made him—nobody put a gun to his back and said, “Come on, work for us.” He said, “Big Greeny gave him a job in New York.” He was snatched, kidnapped, and forced and compelled to work for them, but he did not want to do an honest day’s work. He had already felt the feeling of the “rod” in his pocket, and how easy it was to take a gun, put it in his pocket, and put it up against a man and take his money. Now, he is taking something like \$35. a week. He admitted a hundred sluggings he participated in, and never went to jail; one hundred stench bombs he threw and never went to jail. And the odor of the stench bombs have left his testimony unworthy of belief. This is the 1940 Tannenbaum. What a model? Then all of a sudden, all of a sudden, we have Tannenbaum in 1940 accidentally dropping in, by the purest accident, on September 11, 1936, and overhearing a talk between Rubin and Buchalter. I don’t know where he was before—we don’t know where he was after—we don’t know what he did the morning or the night of the day before the day, or where he got the word, but accidentally he dropped in just as the proper moment to overhear this talk. Rubin saw him there, if it is true that Rubin was there, and spoke about that talk—away back in 1937, you would have remembered it away back in 1940, in the early part of the investigation. But, oh, no, you see, Tannenbaum is not ready for this cast until he admitted six murders on his own account. What a memory he has! Gentlemen, try to think back, any one

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of you, to some business deal you have had away back in 1936 or 1937, and see whether or not you can remember any of the details as this man Tannenbaum remembers, although everything else in his mind is blank. We will show you what a fine memory this Tannenbaum had. He hears the name of Rosen, he hears the name of Dewey, then he nonchalantly walks out. He knows the "bulls" are around watching Lepke, but he doesn't care, he walks out, he does not make any effort to conceal himself, or hide, or sneak away—he walks out; and then he reads in the newspaper about the murder of Rosen, and he sees the Rosen name and the Dewey name, and he puts two and two together, and he remembers, not just accidentally, but exactly, the time measured to the second, when Mendy Weiss is there, and again to overhear a conversation, he with his dictaphone mind. Well, here is a record that he keeps intact until 1940 when he himself is surrounded with six electric chairs. He has a great memory. Well, if he has such a great memory, let us see. He said, like Bernstein, that since Judge O'Dwyer took hold of him he would not tell a lie. Mr. Tannenbaum becomes a roving witness—in California he is a witness—in Newark he is a witness—he got himself a little immunity on the side, you know, but he was a witness—not a witness to the Dutch Schultz killing, participation in it, but he is a witness, and a player for Mr. Rubin—he would put him in any spot he wants—he would coach him and he would put him in, and he would remember, even if he has to be refreshed. They say they don't see much of each other at the Half Moon—they just bunk into each other,

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and say, "Hello, Max," "Hello, Allie," and that is all. A fine situation. If he remembered the testimony in Newark only in June, 1941, when he testified there, and he was asked there about the affidavit, "Did you sign it?", first he said to me, "I was not asked about it." When I showed him the record that he was asked about it, he said, "If it is in the book." All the witnesses know is the one answer in response to Mr. Rosenthal, "If it is in the book, it must be there." Well, it is in the book—irrevocably in the book. But when he is cornered in that case, he says, "Becker told me it was a bill of particulars, I don't remember signing it, I signed it as a bill of particulars." So he was making a liar out of an ex-Assistant District Attorney, like the gentleman who represented the family at this time and was assigned by the Court to defend him in Sullivan County then. But he remembers 1936. So I had to call Mr. Becker here—not because I believed Mr. Turkus charged anything against Mr. Becker, by no means, but I would not let that schemer leave the stand unchallenged by Mr. Becker, and I brought him down to take the stand. And I want to thank Mr. Turkus when he said, "No questions." In other words, he himself did not believe in impugning Mr. Becker's integrity in this case before September 11, 1936.

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Judge O'Dwyer goes up there and he is questioned in Sullivan County—Mr. Tannenbaum is not asked a word about the Rosen case. So he is not given a chance—so Mr. Turkus said, "Wasn't Saul Price your lawyer—wasn't Saul Price attorney for Farvel Cohen?" And not

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10901 even Tannenbaum would lie about that, because if there was no Farvel Cohen in this case, there was no intimation of this case; there was no Saul Price present when the affidavit was drawn, as you heard from the witness stand there. You cannot confuse the issue that subsequently Saul Price was the attorney for Farvel Cohen. We lawyers have a right to accept retainers in cases. There is no other way that I know how to make a living. Mr. Price, Saul Price, at a later time had the right to represent Farvel Cohen, but he was not the attorney then. You cannot be confused about this—no, sir. There was no Farvel Cohen then; there was no intimation that Saul Price told this fellow to keep his mouth shut. And he signed this affidavit, did he? “I don’t know anything about any murder. I did not do any murder. I did not commit any murder.” What is an oath to Little Caesar Tannenbaum?

10902 Then he is brought here again to a hotel. Well, do whatever you want, Mr. District Attorney, with your prisoner—that is your concern, it is not mine. But it is if—if the treatment of the prisoners results in their coming here and rendering false testimony. I wish that I had the announcing ability of Red Barber when he broadcasts baseball games—in Eastchester, Long Island, or wherever it was—it was in Long Island, and there are these unpunished murderers playing a game of baseball. I know what he would have said: “Tannenbaum at bat—batting average six murders—using the stick, lots of experience—he knows how to slug, he knows how to run. Reles, pitching.” Can you

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imagine that? "Reles can shoot the ball at the plate like a bullet—lots of experience." That is what Red Barber would have said. A pleasant thing—handing a murderer a bat to crush the brains of a detective assigned to guard him, because he does not like him. I know you will say to me, "The cops had guns, they would kill him, and he would be dead already." I don't want to criticize my friend in the District Attorney's office for the treatment of these prisoners. Putting a bat in the hands of a six time murderer—leaving detectives at the mercy of these men right out there, and getting recreation, seeing their wives—like shouting a clarion call to all the youth of Brooklyn, "Murderers and killers seeing the world, playing baseball, and squealing against the big fish." I do not want to criticize that practice, but I do not want my money or your money to go to the maintenance of these creatures, and I do not want such treatment to be conducive to their subsequent falsehoods in this court room. Reasons for doubt? The case is full of them, gentlemen. Now, that is for Tannenbaum.

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With respect to my client, I think that is the major portion of the case. Now, we have our defense—very brief to talk about—but I go into it. Just another reminder.

(At the request of Mr. Barshay a five minute recess was then taken. The court room remains in order, the Judge, counsel and jury remain in their places.)

Mr. Barshay (Continuing): But even I cannot say that you must remember where the burden

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of proof lies. Even if you do not like a person's defense, it still does not mean that the People have sustained the burden of proof. I am not suggesting to you that you should not like my defense because it is only the question of lacking opportunity and motive, or the lack of both. The burden is still with the prosecution. That is the law. It never shifts. I cannot go into the jury room with you, but you must not forget it. The burden is with the District Attorney to prove beyond a reasonable doubt the guilt of the defendant—that never shifts. We need not explain nor disprove.

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So Carl Shapiro was called. What a Roman holiday with Carl Shapiro. But it was not unexpected. Do you think the defense would call Carl Shapiro and not expect Mr. Turkus to conduct an excellent job of cross examination? Don't you think we had sense enough to know that when we called Carl Shapiro, that you gentlemen would know he was Gurrath's brother? We knew that. We knew it was an opportunity for Mr. Turkus to bring into this case names and associations of the brother's friends and the extensiveness of their business, and the 700 employees and the \$275,000. place in Baltimore, and the place in New York. The Raleigh is not on trial. This young man was not even asked if he was ever convicted of a crime. I take it that this very industrious District Attorney knew that he was not—at least one member of the Shapiro family is salvaged, one that should be thankful for the fact that he was able to wake up and disassociate himself from the loafers who ran the factory in Baltimore as part owner.

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What has that got to do with the case? What care I how much the Buchalter family drew from this business? What has that got to do with the Rosen killing? Rosen did not enter into the Raleigh situation all through, he had nothing to do with it. But that made atmosphere and prejudice. What did we call Shapiro for? You will get very briefly our purpose in calling Shapiro. There was testimony that the girl, Naomi, was dead, so we made an effort to bring someone who does not say that Tannenbaum was not there, who does not say he did not know Tannenbaum, who does not say that Rubin was not there, who does not say that Berger was not there. That is why we called him. He did not deny knowing these people. If he denied knowing them, you would have a right to say to yourselves, "He is a contemptible liar, we don't believe him at all," and throw it in the scales of justice and see what it weighs. All he says is, "I did not see them while I was there." And the best proof he was an honest person, no matter how stupid he looked on the stand, was checks here and checks there, and all that kind of by-play, giving the District Attorney a chance for atmosphere to show riches in comparison with the poverty of Rosen. That has nothing to do with this case. And look at what he says, at page 2629—he says, "I cannot say exactly I spent every minute of my time that day in the office." You see, there was no effort on the part of the defense to have Mr. Carl Shapiro at certain places, watching who comes in and who goes out and then swearing to you, gentlemen of the jury, "I was there from 9:00 o'clock in the morn-

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ing until 10:00 o'clock at night, I did not see him," drawing the conclusion that he was not there. But we had the right to a reasonable acceptance of the purpose of Shapiro's testimony to be that, in view of the fact there were so many police around watching who and where and why Lepke associated with other people and gangsters—that is all. So he says, "I did not see him—I did not see him." And so much play is made—

10913 Don't you know what you came here for! Of course, he knew what he came for. Lots of the biggest business men take the stand and they cannot enumerate little items. That was made so important by the District Attorney. He knew what he came here for, of course, but that does not mean he knew what questions were to be put to him, in what specific language, in what specific order, whether it be by his own lawyer or by Mr. Turkus. The fact is that he came here simply to say that, "While I was there I did not see him." He did not say, "I did not go out to lunch that day." He did not

10914 say, "I did not go to the bath room that day." He did not say, "I did not go to the barber's that day." He did not say, "I did not walk out on the street that day." He simply said, "While I was there I did not see him."

Rubin already has proven to you that it was not Tannenbaum who was there—that there was no Berger there—that there was no Weiss there. Well, how are we going to know about 1936, investigating the case. If a man goes to Baltimore, from New York to Baltimore, it is reasonable to say, "Is there something you can refresh your memory by as to being in the place?" And

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you pick out some checks, not to prove that he stayed there every single part of the day and watched who came in and who went out, no, just as to the fact that he was in New York in the normal course of events, that is all. What a Roman holiday was made of it! Did you save your railroad ticket—did you save your Pullman ticket? Who saves Pullman tickets? Who saves railroad tickets? If he said, "Yes, I did," and he pulled them out, you might say, "Ah, ha, you knew that some day you would have to testify to an alibi." Who saves railroad tickets? Do you keep them?

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Now, the law is that it is not our duty to prove that; it is always the burden of the People. I felt sorry for Shapiro. This set-up had nothing whatever to do with this case, except that someone wants to prejudice you in that direction.

Then we called Mr. Sobler. Again, I was not bound to call him. He, an old man, cheating the insurance company out of \$12.50 a week. That is what he is doing. He does not want to admit it—but that is not my business. He is cheating the insurance company, so therefore Lepke is guilty of murder. He is hiding behind his wife—she is the front of the business—he is the owner—this old man. Let the insurance company worry about that. There are District Attorneys—let them go to the District Attorney, if there is any violation of the law. We are not here to worry about the insurance company. You see, he was to the lawyer's office before he went to Mr. Turkus, and he went to Mr. Turkus and he signed an affidavit. Still, we used him.

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Why? We had a right, Mr. Turkus, to say to Philly Buchalter, to take him to the lawyer's office and have him sign an affidavit. Who am I, not to go? Who are Wegman and Climenko not to go? Who better than the brother would be interested in going out to get witnesses, who? I haven't any detective—I know them, but they would not go if I sent them. You see, there is our staff—there is Mr. Wegman and his associate. What is wrong about it? There he is, Buchalter, sitting right there, Philly Buchalter. If it was wrong, he would be right in jail—he would be interfering with this trial. We have a right to get witnesses and speak to them and get their statements. We cannot drag them off the sidewalks to come to the lawyer's office. Where should I see a person—where else? If I saw them somewhere else, they would say, "What is the matter with your office?" Either way they get you. Because they do that, you gentlemen will be left with the impression that it is wrong for a lawyer to investigate a case. It is not wrong for a lawyer to investigate his case. I never undertake any case unless I can make the fullest investigation at my command. The City of New York has trained me well and paid me well to do that, and I do not take matters that are left in my hands unless I investigate cases, no more than a surgeon would when he sterilizes instruments when someone is brought in on the operating table. There is nothing wrong about that.

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Now, Mr. Turkus did a pretty good job himself, and rightfully so. What was it the old man testified to after some questions were put

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to him about Dutch Schultz? "Like me would be associated with Dutch Schultz!" This old man faints, he almost fainted here. The Court said his emotions were so great that they overcame him. Dutch Schultz would pick him to be an associate? He has a brother-in-law, one Richter, but there is no proof he associated with Dutch Schultz, his brother-in-law, in this case. But I would not care if his brother-in-law was Dillinger himself, it has nothing to do with this case, except that it goes before the jury with the hope that some juror may say, "Ah, the brother-in-law goes with Dutch Schultz, therefore I cannot believe this old man."

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We have these documents, drawn long, long before there was a contemplation of any case like the Rosen case. Are they forged documents? They are originals, and there is no doubt about it. And what does he tell you? The story I told you originally—bad business on account the Pennsylvania route didn't pay. Kelly got out. He drew \$75. a week and then there was a stoppage, "And Rosen came to me, he pleaded, he wanted to quit to work for the Garfield." And he said to Rosen, "Well, Louis Cooper will not take you." "I know," Rosen said, "Buchalter is interested in the concern, and he will take you," which happens to be the truth. Is there any question that when Rosen quit this concern there was a demand for back pay, or the commencement of a law suit for the value of the shares or the block of stock that were Rosen's? There was not. But speaking of the paper drawn, in the affidavit drawn in the District Attorney's office, all of a sudden

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we get stenographers in the District Attorney's office. Up to that time there was no stenographer in the District Attorney's office. "Tannenbaum, did you make a statement?"— No stenographer present. "Magoon, did you make a statement?"— No stenographer present. Mrs. Rosen, did you make a statement?"— No stenographer present. I know the answer perfectly, gentlemen, but before I give it to you,

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stenographers in the District Attorney's office. They have not been fired. In the budget there still remains stenographers for the District Attorney's office. But, you see, under the law, as his Honor shall tell you, when a person makes a statement in question and answer form, and then he is offered as a witness, the Court has the right to look at that statement and see if there are any prior inconsistent statements. In other words, if Rubin came in and made a statement to the District Attorney's office—you see that done time and time again,

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gentlemen—any person who made a statement away back in 1936, there were stenographers there—now there are not any. The Judge looks at the statement and he says, "Counsel for the defense, you have a right to look at portions, the sixth, the seventh, the eighth lines, or whatever it is, and ask a question of the witness whether or not there is anything prior." As I said, this case was built on a movable foundation; you cannot anchor it. You cannot know what he told the first time, whether Tannenbaum, Magoon, Berger, anybody else—you cannot know, because there are no statements.

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because he knows that the law is that if he told a falsehood then, I might be able to show it upon the stand. But they took private notes of just the sum and substance of what those people stated. Pretty clever—pretty clever, I say. Ah, but when there is a defendant's witness that visited the District Attorney's office, up pops a stenographer. Then they get him. Mr. Turkus will say to you, "Sure, there are other cases pending. What do you want, the lawyers in this case to find out by an examination of the statement what the evidence may be in another case?" That is not the answer, gentlemen. The Judge is the only one who looks at the statement, and he gives me only that what I am entitled to, not a word or a syllable more, and you can trust the integrity of the Judge that he would not show me, or Mr. Rosenthal, or Judge Talley, a single syllable of the testimony that has something to do with another case. That is the answer that Mr. Turkus will give you, but that is not the real answer, and I am nobody's fool with respect to experience in that type of work. I could not find out anything about any other case hidden there in the old statement. The Judge said, the sixth line, the seventh line, the eighth line, or the ninth line, you can have that, and nothing else but that which pertains to this case. But this case is on a movable foundation, gentlemen—a three card monte—not clean.

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Sobler made his statement, but Sobler's statement is not in question and answer form, so we do not get what was asked or what was answered, or what was given as an explanation—we only know the conclusion and the interpreta-

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tion of the Assistant District Attorney wh put down the results of a long conversation with Sobler. Now, for example, Mr. Turkus said to Sobler, "Didn't you say that Bluestein took you into the New York and New Jersey?" He said, "I did not say so." He reads in the affidavit—it says, "Sobler or Bluestein took me into the New York and New Jersey." But the old man says, "No, he did not take me in, we organized it together, there was no New York and New Jersey, we simply organized it together." So, you see, the meaning is the same, but the interpretation of the assistant who gives his conclusions in the form of an affidavit, whether signed on every line with pencil or ink, had nothing to do with the case. The point is, the way to get a statement from a man so a jury can have it, is by question and answer form. That is the way to do it, and that is the way it has been done for years. What does he say? "One was a slavery business, one was a knee-pants business, one was a gentleman's business." One was a slavery business. Was there a good living after Kelly got out? Well, you see, there is no date as to when they had a good living. Look at the affidavit, or have that testimony read to you. It is pretty clever. Is Bluestein over here, or Kelly over here? There is no proof they are dead. If they had testimony to give contrary to this old man Sobler's, you would have had them here like they had the man from Kansas, Missouri, Gahkosh, or from any place in this world. How powerful the District Attorney's office is—they can snatch people off the streets, from here and there, if they can only prove the defense is lying.

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Well, it was quite a paying business, as he said—it certainly did not net any one of them \$100. or \$75. a week. Nobody forced them out of business after the stoppage. Sobler continued for six month and then they separated—that is the sum and substance. He was only called to show you what we contended throughout—that he was not forced out of anything that he had—he had nothing and was given something better.

Now, gentlemen, when I sit down I shall feel the most tormented person in this court room. I know I have not done half as good a job as could be done with an interpretation of the evidence here. I will think of a thousand things I should have said that I did not say. But I am only human— I am not a Tannenbaum— I haven't such a memory; I am not a Berger; I am not a Rubin; I have no such faculties. My thoughts are just going out of my mind and out of my mouth to you jurors here. I know there are rules which permit Mr. Turkus to answer me, but I cannot answer him— I cannot because the law does not allow it; not that I could not offer proof, because there isn't any argument that he can give in this case, based upon this record—and I do not say this braggadocioally—that I could not answer, but there must be an end some place.

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Now, you gentlemen are not bound only by the answer of counsel; if there is any reason you can give in answer to the argument by Mr. Turkus, you give it—you do not owe him the duty to be a convicting jury, no more than you owe me a duty to be an acquittal jury. I want you to consider the evidence fairly, fairly as

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against each defendant separately. I want you to know that myself and associate counsel for Buchalter tried to do a reasonable, good job—a fair, honest job; and I want you to know that, in my judgment, when I told Buchalter not to take the stand, it was my judgment, and you have no right to draw an unfavorable inference because of that.

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The burden of proof is on the District Attorney—he has not sustained it, gentlemen, in this case. Irrespective of who he is, or what he is, he is entitled to his day in court. I have faith and confidence that the verdict which you will render will reflect truth in this case, based upon the evidence as you heard it and upon the law as his Honor shall give it, with respect to Buchalter, and that you shall say, courageously, fearlessly, and honestly, “Not guilty”.

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The Court: There will be no further summations today, because summations must not be continued to a point of losing the attention of the jury. The jury must be able to listen and digest arguments, so we will continue tomorrow morning, and at that time, the other summation by the attorney for the defendant Weiss, first.

In the meantime, gentlemen of the jury, please do not discuss the case, let nobody talk to you about it, keep your minds open, and remember, follow all the other admonitions heretofore given.

The jury will first leave.

Now the defendants are remanded.

(Recess was thereupon taken to November 27, 1941, at 10:00 A. M.)

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Brooklyn, N. Y., November 27, 1941.

TRIAL RESUMED

(Defendants present; jury not present.)

Court Clerk: Judge Taylor is confined to his room with a heavy cold. On his telephoned instructions, and unless there be objection by counsel, the trial will resume tomorrow morning at ten o'clock.

Mr. Rosenthal: No objection.

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Court Clerk: Hearing no objections, this case stands adjourned until tomorrow morning at ten o'clock.

(An adjournment was thereupon taken to November 28, 1941, at 10 A. M.)

Brooklyn, N. Y. November 28, 1941.

TRIAL RESUMED

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(Mr. Talley, on behalf of the defendant Weiss, summed up as follows:)

Mr. Talley: May it please the Court, Mr. Foreman, and gentlemen of the jury:

This has been a long and difficult trial for everybody concerned, not the least for you gentlemen, who have had to make such sacrifices to carry out your obligations as citizens of this community. Counsel desire to express their thanks to you for the careful, constant attention

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that you have given to the presentation of the evidence in this case. As my responsibilities come to an end, yours are about to commence, and they are pretty heavy, because you are going to be asked to do an extremely difficult thing. It is a difficult thing for one man to be called out of his ordinary avocation of life to sit in a jury box and pass upon the guilt or innocence of another fellow man. It is so hard to find truth in all this panoply of court-room justice, Judge on the bench in his robe, counsel, court officers. They are all created for the purpose of ascertaining the truth, that is all. That is all it comes down to. You know Pilate asked that question many hundreds of years ago, "What is truth?" and it has not been answered to this day.

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It is a pretty heavy burden to put upon twelve men called from their homes and occupations, to give them the power to say what is the truth and what are the facts pertaining to any particular case, but it is our method of ascertaining the truth, of trying to. It is our method of trying to live up to our reputation of being, as a nation, and a people, no respecter of persons. We like to feel that it is a tribute to American life to say that every man, no matter how poor, humble, or benighted or corrupt, no matter how high his position or how influential, or how rich he may be, all men are equal before the law; all men are entitled to the same consideration when they come into a court of justice.

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That is why the figure of Justice is blindfolded. She is not supposed to see the identity or recognize the identity of the suppliant that comes before her. She holds at even balance the



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scales of justice, because they must be held at even balance; they must not be weighed down by power or might or influence of the State on the one hand, or by any consideration affecting a defendant in a case on the other. That is why the symbol of Justice means something.

When you were selected on this jury—and it seems a long while ago, doesn't it—there were certain principles of law indicated to you in your examination as talesmen which now become of very serious and significant importance to you, because you did not deceive counsel who asked you if you would take these considerations of law into the jury room with you, and this is the time for us to check up with you and see that you are going to, in your jury room, after you have heard the argument of counsel and of the District Attorney and the charge of the learned Court, and apply these principles of American law.

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You remember you were asked about your understanding of the American doctrine of presumption of innocence. We are coming back to that now at the conclusion ~~of this trial~~, and the learned Court—and I hope it is a well Court this morning—the learned Court will charge you at the proper time in this case the significance and importance of the doctrine of the presumption of innocence, and it means, as you will recall, that under our system of justice, in every state of our Union, a defendant charged by the State with the commission of crime is presumed to be innocent until his guilt is proven, and then, as an extension of that doctrine, his guilt must be proven beyond a reasonable doubt, but we will

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speak first of his presumption of innocence. It means that merely because an indictment is found by a Grand Jury, that the finding of that indictment carries with it no implication that the man or woman is guilty of the crime that is charged in that indictment. It is simply an accusation in writing, and it is the first thing that starts the wheels of justice moving in a criminal case, but it means this: It means that a man does not have to come into an American court and prove his innocence. Let us get that perfectly clear in our minds. Were you and I charged with crime, we would not have to proclaim our innocence of that crime from the housetop and say, "I am innocent; I am innocent." Remember the great dramatic story of Dreyfus, charged with treason in France, when the chevrons were stripped from his shoulders and the sword broken over a knee in the public courtyard, as they marched him around in disgrace, this captain of the French Army, who screamed at the top of his voice, "I am innocent! I am innocent! I am innocent!"

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You do not have to do that in American law. The State says you are guilty of a crime. Here is a paper that gives you the date and details as to the time of the commission of the crime, but we have to prove you are guilty, and the Court must see that you are proven guilty by credible evidence, in an open court-room, before any jury of twelve men will be permitted to find a person, charged in this country with crime, guilty.

See what a tremendous thing that is, tremendous. We are proud of it here in the United States. It is our system of jurisprudence, and it

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is the result of centuries of experience where free people must be given some power to resist the power, the majesty, the might of the State. That means a ruling power. Whether he be king or emperor or dictator or president or governor of a state, there must be restrictions upon his power over the individual, else we are not free men, and this is one of the things, and it is of tremendous and vital importance when we consider our heavy responsibilities, yours as jurors, mine as counsel, in a case like this.

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The Court, as I said, will charge you about the presumption of innocence, but it is going to come to you, I make bold to say to you, in a rather battered condition, rather battered. In this case it has received its body blow—I am not quarreling with anybody about this—from this host of policemen in uniform and out of uniform in the halls and the corridors where you could see them every day and two or three times a day, in the court-room, in the corridors, placed here, placed there, either in uniform or with their badges conspicuously showing. Even yesterday, the force of policemen on the floor above, where you gentlemen were, uniformed policemen. Why? I do not know. These defendants—these defendants, presumed to be innocent, brought into this court-room with handcuffs on them and paraded before you three or four times a day. What is the purpose of that? What do you think?

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Now, we must have proof beyond a reasonable doubt. That you will be charged at the proper time. That means that there must not only be proof given in the form of documents or myriads of photographs, but the testimony from witnesses. Before you can find a defendant guilty

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in our courts of law, you must be satisfied of his guilt beyond a reasonable doubt. Just let that seep into your mind. You will see why I speak of the terrific responsibility that you twelve gentlemen have. If there is any doubt in your mind that a witness is telling the truth, or has told the truth, if there is any doubt in your mind as to whether these defendants did the things that these witnesses have said they did, that doubt must be resolved in favor of these defendants. That is what proof beyond a reasonable doubt means. You have got to be satisfied beyond a reasonable doubt. The law says not any doubt, but beyond a reasonable doubt, the kind of a doubt that a man might have about the ordinary affairs of his business and domestic life, and if you are not convinced beyond that, then your duty under your oaths and obligations is to free these defendants.

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There is another important element about which I would like to remind you and that I am sure the Court will charge you—I know he will if we request it; I think he will even if we don't—and that is that if you believe—this is again our American law—if you believe that any witness has wilfully testified falsely about any material point in the case, you are at liberty to disregard his entire testimony. Now, understand that. His entire testimony may be simply blotted out of your mind and out of your consideration if you are satisfied, after hearing him testify, that he has wilfully lied about any material matter that affects this case. And on that subject, let me, in passing, say this: It is a supposition, I hope not a vain supposition, that

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honest people or dishonest people—it makes no difference who they are, once the power of the State has been leveled against them and charged them with crime—have a great measure of protection, because we require every person who comes to the witness stand to take an oath that he or she will tell the truth. I wonder if to you men, during the progress of this trial, seeing it administered to so many witnesses, I wonder if it lost its significance. It never has to me, with all the years that I have seen it taken. It is a terrible solemn thing. We raise our hand up to heaven and we call upon the Divine Creator, Master of all our lives and fortunes, who holds the destinies of each one in the power of His hand to crush like that—we call upon Him to come into this court-room, stand beside the witness chair, and witness that this person is telling the truth. What a solemn thing that is. It is a far cry from this court-room, 1941, to the 17th of September, 1796, but it is not so far in distance from the place where this sentiment was uttered, in Faunce's Tavern, right down here in Broad Street, Manhattan—you can get there in five minutes from this court-room—when Washington, laying down his duties, his responsibilities as the purest patriot this country ever saw, delivered an address which we are told took two years to prepare, and in which he said this: "Let it simply be asked, Where is the security for property, for reputation, for life, the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?" That was Washington's comment of warning to people he loved so much, in the

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country for which he had done so much: "Where is the security for property, for reputation, for life, the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice?"

Well, I had to shudder when I heard the oaths taken by the witnesses who have been called by the prosecution in this case. It just gave me a creepy feeling, that all the experience I have had in the court-room has never taken away and never will.

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Your responsibility, gentlemen of this jury, is in being called upon to pass upon the question of whether these men shall live or die, because that is the result of your verdict, as you know. The terrible responsibility that is yours is placed upon you by the prosecution in this case in asking you to render a verdict of guilty of murder in the first degree on the testimony of the vilest array of murderers, sluggers, perjurers, that have ever sat in a court-room in the course of one trial, in my opinion. There is your responsibility, and I don't think it is a fair responsibility to have placed upon the shoulders of any twelve men in this county, that they bring, one after another, these men who confessed that on other occasions, in other court-rooms as solemn as this and on occasions as important, when men were on trial for murder, these men admit that they have committed perjury, that they have lied under oath, that they have called upon the Almighty to witness truth of what they say, and then in the face of His majestic presence, His omnipotent power, they have lied to deceive other jurors. What, in

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heaven's name, is the assurance that we have here that they are telling the truth here? They perjured themselves in other cases; why not here? Where is the sense of religious obligation that I have quoted to you that should and must accompany an oath in the case of these men who admit six murders—imagine, admit six. If they admit six, how many have they committed? And they told of the different parts they played in them. They fingered this victim; they drove the car for this victim; they threw a body in the lake in this murder case; they stood as a lookout while in a field up in Sullivan County the body of a murdered man was dropped into a hastily-made grave.

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It is a pretty tough thing, I am telling you, gentlemen, for any District Attorney to bring before you, seeking and yearning to get the truth, the testimony of men of that type, and then ask you to believe it. That is what they have asked you to do in this case. And how you can possibly do it is more than I am able to see or will be able to see, because you are supposed to bring into the jury room, as you are supposed to bring into the jury box, your experience and your common sense in the ordinary affairs of life. You do not hang those on a hat rack with your hat and coat when you become a jurymen. You are supposed to see these things in the light of your own experience, your knowledge of men, your knowledge of things. Would you take the word of any of those people who have been called here—any of them—in any ordinary affairs of life? If you had any business transaction with any of them, would you trust them as far as you

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could see them? You would not. And yet you are asked in this case to believe what they say in this new, regenerate time. What has happened to them? They have all reformed. They have all become white as the driven snow. They were dark as the depths of hell before, but now they are all white.

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Little white lies! They told you in their lives, they blushinglly admitted that they had told little white lies. They would not lie to save themselves, according to their reformed, purified disposition now. They ask you to believe that they are telling the truth, and in the back of their low, degenerate cunning minds is that native, primal instinct that even the animals possess, to save themselves. That is the background that looms behind all this wicked testimony that has been given. They want to save themselves, and, up to now, they have been quite successful by their method in doing it, quite successful.

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It is against the canons of ethics that govern reputable lawyers to seek clients and solicit business. We cannot do that. We cannot advertise like Abraham & Straus advertise the Christmas business. We have got to wait for our clients to come to us, and I am going to violate that right here, now, out in public, and take the consequences. I would like one client who would be a taxpayer here in the County of Kings that would retain me—and I offer my services, believe it or not, without compensation if a taxpayer will retain me to break up for all time this menace, terribly dangerous idea, of locking murderers and criminals and crooks and perjurers, not locking them up behind prison doors, where they belong, but by letting them luxuriate in the best hotels

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that we have in the county, not on prison fare, but dining in their living room, served by waiters, with dainty cups and dishes, not hotels on the riverfront or down on the Bowery, not the Mills Hotels or the lodging houses where humble people go, not at all. These people are put up in the Waldorf of Coney Island, the Half Moon, with an ocean view in summer, and, I suppose, the exposure to the sun in winter; put up in the Bossert Hotel here in Brooklyn, the Towers Hotel. Just imagine it!

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I say that no district attorney nor any other official has the right to spend taxpayers' money pampering these criminals in hotels in the city. What is the effect of it? It is not the mere spending of money. This is an extravagant town, extravagant nation. Officials don't care how they spend people's money these days. We used to stagger at millions; now we don't blink an eyelash at billions in appropriations. But here is the menace of that. They are gathered together in one hotel, on the eighth floor; their rooms are adjoining—this is testimony in this case—twenty-four hours a day they are there; they dine in community; they don't have to sit in the cell with a tin dish. Oh, no. They dine in their living room. Who was it told us that? Tannenbaum. And, of course, they have an opportunity to talk, and they are given a year and a half in this case—more than that,—May, 1940, or thereabouts—to get their heads together and fit in, fit in the various bits of evidence so as to try to make a complete, unassailable story. There is the terrible menace of that kind of incarceration for people who say, "Why, these fellows are in jail, in the Federal House of De-

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tention; they are behind bars twenty-four hours a day; their food is passed in to them through a steel grating. We are here at the Half Moon Hotel. We are taken out for exercise, for entertainment. Our wives are allowed to come to see us,"—eleven o'clock at night, you heard one of them testify, he saw the wife of Reles.—“This is the best side of the fence for us to be on. Let them sweat; let them suffer; let them burn. We are going to live in the best hotels that Brooklyn can afford. Just for what? Why, for trying to save ourselves and tell the story that the District Attorney's willing ears would like to hear, and we will try and fit in these loose ends together, and while we are playing cards or eating our hotel meals, why we will just check up our various stories and see if they all fit in.” There is the menace of this new, 1941, streamlined method of handling crooks and criminals. See the terrible inducement that is offered to these men to lie and perjure themselves. Why, they were not even indicted for the crimes which they admitted to the District Attorney a year and a half ago they committed, not even indicted. We have seen them here, not even accused of crimes which they admit, and we see them now, fully confident that because of the testimony that they give in this case—and they are quite willing to give it in others—they will soon be walking the streets as free as you or I, while the victims of their perjury are in prison or in their graves.

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Now, I was going to discuss the witnesses as soon as possible in the order in which they appeared, but I cannot do that because I don't

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want to take any longer than this morning's session. I don't want to asphyxiate you men with too much legal oratory. I want to keep your minds clear, but I must point out to you some of the important things that have been said and the more important things that have not been said in the progress of this case. You remember the information that was conveyed to you when this case opened, about the rule that you cannot convict upon the testimony of accomplices, men who themselves participated in the crime, and that you must have evidence independent of any accomplices' before you can convict a man of crime. That again has a background of centuries of experience. That again is supposed to be a protection that we in America have against the informer, the informer who is trying to gain something for himself, some benefit to himself, the safety of his own skin, by talking against somebody else.

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Mrs. Rosen's testimony about the man who came in was so much lighter in weight than the defendant Weiss, that that is out of this case. The Court has already informed you of that. That might have been regarded, if you believed it, as some measure of corroboration coming from one who is not an accomplice. That is out of the case. There is only one bit of corroboration that will be attempted to be impressed upon you in this case from other than accomplices in the murder, and that comes from this unspeakably horrible looking Tannenbaum, you remember, the man who looked like a death mask the day he appeared—terrible looking—Tannenbaum. So that that question about the man who came into the store the night before and looked

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around, that is out of the case and you cannot consider it.

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Was it to induce that identification, or attempted identification, of the defendant Weiss that Mrs. Rosen, the widow of the man who was killed, was made a guest at the Half Moon Hotel where these other witnesses who were prepared to try and convict Weiss in 'this killing were located and stationed? Did you ever hear of such a thing, putting up the widow of a murdered man in a hotel and keeping her there as a guest? For what? It would be a natural thing for her to have all the resentment in the world, wouldn't it, against the men she believed had been responsible for the death of her husband? Did she need any inducement? Did she need any price? They wanted some corroboration and they brought her into this court-room while you were being selected as jurors, and had her look at Weiss so as to make sure that she would not pick out the wrong one of these three defendants when she came in. That is how sure they were about identification.

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A very much lighter man, she says, this man in shirt sleeves, this man that came in, walked around the store, walked around. Why, you would think it was Macy's or Loeser's that she was talking about. This store is not much bigger than this jury box. You remember one of the men described it in the other room. I think he stopped and pointed about where you sit (indicating). He said that is as long as the store was, and that is all it is. It is the smallest thing you ever saw. It would be absurd for anyone to walk in and look at it

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at all. All you had to do was walk past and you could see every cubic inch of that store, as you can today, tonight. A brilliantly lighted street, Sutter Avenue. Ridiculous, the contention that it was necessary for anyone to come around that store to have Rosen pointed out, as they say they had to point Rosen out to Weiss. It is a single-man business, single-man store, a candy store, a hole in the wall, that is about what it is, despite this gorgeous photograph that every day was put on the stage for you gentlemen to look at as the place of the murder. Just a hole in the wall with one of these open windows where they could serve soda or candy or cigarettes to anybody on the sidewalk without leaving the store. You know the type of men that stand behind the counter, just hand it out through the window, and yet they go through an elaborate story here of people bringing over Weiss to show him Rosen, what he looked like. He could not possibly mistake him by just walking past that stand. He was the only man there in that store. But, however, that is part of their case.

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The first witness of the type that you are asked to believe—the others were all preliminary—was Mr. Bernstein. Bernstein—I do not know whether you remember his appearance; it seems almost like ancient history since he opened this case with his testimony—Bernstein is the man who said he stole the car with the aid of one “Muggsy” Cohen and, in order to put his friend “Muggsy” Cohen in as bad as he possibly could, he says “the best automobile and radio thief in the business,” like George M. Cohan says every song-and-dance man thinks

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he is the best song-and-dance man in the world. "Muggsy" Cohen, and Bernstein, who admits having stolen fifty automobiles, and my point is these are not modest gentlemen. If they stole fifty, you can bet your life that the real number would be nearer a hundred and fifty. That beautiful expression of "Blue Jaw" Magoon "stole a hundred or better." A hundred automobiles or better. Realize, a hundred automobiles, probably more than they will have in the next automobile show. A hundred automobiles would block up this street outside this court house, take them an hour in single file to pass by; give them one minute to go by and only sixty could go by in an hour. A hundred automobiles he stole, or better. Bernstein says that he, with his record of fifty automobiles that he stole, had to go out and engage a gentleman named "Muggsy" Cohen to steal this particular automobile. See the deviltry of it! Did not want to put himself in this murder as an accomplice, stealing a murder car, so he puts it on "Muggsy" Cohen. And he, Bernstein, tells us he gave his story about this killing to the District Attorney in April or May of 1940, not this year, last year, April or May, before the summer of a year ago. Two summers have passed since he gave himself up to the District Attorney and, of course, with his innate honesty, he must be presumed to have told the District Attorney of this county all the truth about this killing. Well, it seems to me if I was District Attorney and a man told me he would engage another to steal an automobile for use in a murder, I would hustle out and get that man that stole the car and slap him in. Not so "Muggsy"

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Cohen. A year ago last May, we must assume—because Mr. Bernstein, according to the District Attorney, is an honorable man—we must assume that he told the District Attorney all the story, but lo and behold you, Mr. “Muggsy” Cohen did not appear upon the scene until you had heard Bernstein testify for at least two days, and then, for some curious reason or other,—surely it could not have been the theatrical effect,—young “Muggsy” was brought in and stood at the foot of the jury box to have his old friend Bernstein pick him out, as if Bernstein did not know him. Never had been arrested up to that time. Was not arrested then, but he was put into custody in, I think, the Towers Hotel, in custody, a man who had stolen the automobile, taken the radio out of it, turned the car over in the dead of night—one o’clock, Mr. Bernstein said it was, one a. m. He was not brought in here until he could be paraded before you gentlemen as the villian in a Punch and Judy show is brought before children. It was not any more necessary than bringing an elephant from Barnum’s Circus, bringing “Muggsy” Cohen and saying, “Is this ‘Muggsy’ Cohen?” “That is ‘Muggsy’ Cohen.” I had to call “Muggsy” Cohen, although they had him in the custody of the police officials, and when I did call him and had him sit in that chair, the District Attorney did not dare ask him a word, not a word, about the theft of that car. But there is this much in the evidence in this case that I was able to get out of that episode,—and it is rather disconcerting, and I would like

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the District Attorney in his address to you to answer and explain to you, because it is inexplicable to me,—Bernstein told you positively—I am sure you remember; you may remember my insistence in having him answer definitely—that he had not seen “Muggsy” Cohen from the time he gave himself up in May, 1940, until he saw him standing in the court-room when we were then conducting this trial. I hope you remember that testimony. It is very vivid in my mind. He said, “I have not seen him since I was picked up in May, 1940.” Well, I did not have much success under the rulings of the Court, under the objections of the District Attorney, in getting what I wanted in the way of testimony from “Muggsy” Cohen. The Court sustained the objections, I have to say rightfully, because the Court is presumed to know the law, but I could not get it in except to this extent: that “Muggsy” Cohen admitted that he had been in the District Attorney’s office in April of 1941; that he had given a statement to the District Attorney at that time, which was referred to by Mr. Turkus as an affidavit; and “Muggsy” Cohen also testified here that he had been in the District Attorney’s office and had seen Mr. Bernstein.

Now, it does not interest me whether “Muggsy” Cohen is telling the truth or whether Bernstein is telling the truth, on general principles, but they both could not be telling the truth, and I say to you that Bernstein and Cohen met in the District Attorney’s office in May of this year, and I point to the evidence and record in this case to satisfy you of it. The

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point is that the District Attorney sat in this court-room, in your presence, and allowed Bernstein to testify under oath that he had not seen Cohen since May, 1940. This was not a matter that he had to take anybody else's testimony about; this was a matter that the District Attorney knew about, because he was there, and I want to know if that is fair dealing with a jury of twelve men, torn with anxiety to get the truth and do the right thing, that I know you want to do, and that kind of testimony is allowed to appear and go by unchallenged. All he had to say is, "Stop, Bernstein. That is not the truth, and you know it is not the truth. You know that you saw him in my office in April, 1941." Oh, no. That was allowed to go by, and that is a pretty serious situation.

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Now, of course, the Cohen business was dragged in solely from the distorted idea of Bernstein that he ought to have some corroboration by somebody that was not connected with the crime, as he thought, to back up his story of the stealing of that automobile, and that is why he brought Cohen in. I say it is perfectly ridiculous that an automobile thief with Bernstein's admitted record, fifty cars or more, should have to engage anybody else, particularly a little crook of the type of "Muggsy" Cohen, to steal this automobile. He did steal fifty others, he said; why couldn't he have stolen this one? You remember his testimony of how carefully he had gone over the route seven or eight times through streets where he had been brought up as a boy. He knew them even better than he knew how to steal automobiles. They had

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to rehearse this proceeding seven or eight times, in this automobile, over the route in the city. He knew this car was to be used for a murder; he knew that as well as I know that I am now addressing you gentlemen, and yet he was ready to go out and steal the car; he was ready to go out and get the drop; he was ready to sneak in in the middle of the night, with his flashlight, you remember, screwdriver and flashlight, taken out of his car. Wonderful how these fellows all have automobiles, wonderful. Maybe, if you can steal them as well as they can, it is not so wonderful. They all seem to have automobiles to ride around in, their own or somebody else's. He not only stole the car and got the place to keep it the night before, but he drove the car there and waited outside of Rosen's place for this killing to be done, waited with his engine going, his doors open, so that the murderers could rush back into the car and get away. He says he heard shots fired, saw the men come out, and he drove away. If that is not cold-blooded, premeditated murder, there never was cold-

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blooded, premeditated murder. This man Bernstein is as guilty of the killing of Rosen, on his own admission, as the man who fired the shot. A look-out who stands outside of a building while his confederates are upstairs burglarizing, the law says, is just as guilty, just as guilty of that crime on the seventh floor of an apartment, as though he was there himself, and if the occupant of that apartment house, on the seventh floor, is killed during the robbery, the man downstairs, the look-out, is equally guilty with the man who does the killing on the seventh floor. That is the law. And yet this admitted accom-

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plice in this murder is the man who was brought here and whose integrity is vouched for by the District Attorney, else he should not have called him.

Now, let us see this Bernstein who would not tell a lie. Why, he admitted being in a hold-up before he ever met Mendy Weiss, before he ever knew him. He admitted a hold-up with a gun, and he was ready to kill a man if he resisted. Remember the horrible story of his walking nonchalantly around Sullivan County and he is accosted and is asked to get into a wagon and ride with a dead body of a man named Yuran; rode along with this body of the murdered man, along the roads somewhere up around Monticello, Sullivan County. He rode with the body and then went into the field where they buried it, buried it like you would bury a dead dog, while he stood look-out guard. He gets himself as far away from the actual killing as he can, but he is willing to admit that he acted as look-out, a ghoul, a grave digger, a thing that gives the normal man the creeps even to think about it, and while these murderers buried the body of Yuran, Mr. Bernstein, the District Attorney's witness, stood looking down this road, down that road, to see if anybody was coming to interfere with the ghoulish job of burying this body. Horrible! That is merely one of his adventures.

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The important thing for you to determine is, Is this man, despite his murderous propensities, telling the truth here? Let us put an acid test on that. He admits that he perjured himself in this trial in Monticello, in what is known as the Gangi Cohen case, where he denied any participation, in any form, in this particular Rosen

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killing that you gentlemen are impaneled to listen to. He perjured himself when he said that, that he had no participation and knew nothing about it. That is his sworn testimony in that case. Now, if he perjured himself there, what assurance have we got or have you got that he is not perjuring himself here? It just does not make sense. Why should he lie up there and tell the truth here? He was in the same situation up there as he is here. He was trying to save himself from participation in or knowledge of that murder, and, gentlemen, he takes an oath to tell the truth and lies to that jury, tries to deceive them. Who is going to stand here and say that he was not lying and trying to deceive you in giving the testimony about this case? Things don't change that quickly. Men do not become suddenly vile and neither do men become suddenly virtuous. If he testified falsely once before, I say you have every reason to believe he is lying falsely here now in this case. What is the reason? See how adroit these fellows think they are. What reason does he give for the perjury in Monticello? Very ingenious, but how silly. He says he did not want to tell the jury in that case the truth, even though he swore to tell the truth, the whole truth and nothing but the truth, because some of the accused in the Rosen case had not yet been apprehended, had not yet been put under arrest. What business was that of his? Who gave him the right, if it was so, and of course it was not, who gave him the right to determine how much of the truth he would tell and how much he would keep away of the truth from the jury that was listening to that

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case? A man's life was at stake in that case just as much as three men's lives are at stake here, and yet he goes on and falsely testifies and tries to deceive that jury up there—he has to—so that they will believe him. “Oh, no, I had nothing to do with the Rosen case. I am not that bad. You saw me raise my hand, and you must believe what I said.” And when we asked him why he testified falsely there, that is the answer he gave, and bear in mind that he talked to the District Attorney of Sullivan County and the District Attorney of this county in Sullivan County, in Monticello, before he went on to testify. Now, was he committing perjury?

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Let us see another instance of it referred to by Mr. Barshay in his able address to you—and there cannot be any mistake about this perjury. You remember he said he was held incommunicado in his luxurious hotel? It is not a bad hotel, either, the Half Moon—pretty good. His expression was, wherever he got it, “We had no intercourse with the outside world, no communication with the outside world.” That is the expression that stuck in my mind, “outside world.” And yet the counsel in this case was able to show you that he had sent out at least six different letters from that hotel, after trying to make you believe that not only was he not allowed to talk with anybody, but he was not allowed to send out any communications; and so apparent was his perjury in this case that even this honorable Court denounced it from the bench, and I ask that he be committed for perjury right here and now, in this court-room, as an example to him and others who are brought

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here to perjure themselves to save their worthless lives.

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Do you need any further assurance about whether to believe Mr. Bernstein in anything he says or not when even that situation was presented to you in this court-room? Are you going to let these people pull the wool over your eyes, these desperate characters and liars and murderers and strong-arm men, stink bomb throwers? Are they going back to their luxurious sitting room in the Half Moon Hotel and laugh their heads off at the way twelve business men of the Borough of Brooklyn are fooled by their story? I don't think so; I don't think so.

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Remember, there always comes a place where these perjuries must stop. You remember his story about spending the night in Farvel Cohen's apartment, waiting for the coming of the dawn to do this murder. He said he slept on a rug. Bear in mind he could not describe the apartment, did not know how many rooms there were in it, did not know who else slept on the rugs, did not know who slept in the beds, knew nothing whatever about it. That is something he had not figured on, that he would be asked to describe that apartment. Knew nothing about it, could not describe it. The reason was he was not there. That is why he could not describe it. If he had been there he would have given you a very accurate description. That is Bernstein. I think it is a great injustice to you gentlemen to be asked by the District Attorney of this county to believe the testimony of a man of that kind. It seems to me it is unthinkable that with his record as a thief, as an accomplice in mur-

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ders, as a look-out over the grave of a victim of a murder, it is a great injustice to ask you to believe anything that this man says, and I am convinced that you are not going to. Don't leave your common sense and your judgment outside of this court-room. Here is where we all need it. The people of this city, the people of this county, need your common sense now more than they may ever need it again. Don't be fooled by this kind of testimony from murderers, sluggers, perjurers.

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I am going down the line. Since it takes so long to go over one of them, I am so afraid of burdening you by too much talk.

Probably the most horrifying witness of all the witnesses on this point was one who did not implicate the defendant I am representing at all, Weiss, so much so that we did not even cross-examine him, but if ever there was a villain that showed it in every line of his face, it was this smooth, oily, Communistic, Union Square orator, Max Rubin, who could not restrain his vindictiveness and could not restrain his desire—and he was a great actor—David Warfield, about whom I read this morning in the paper, never had anything on Mr. Rubin as an actor—the sudden outburst of anger, his tear-flushed eyes, great, great; this clothing cutter that could not cut a baby's pinafore and yet was going around dictating to decent men in the clothing business what they should do and how they should conduct their business; this cold-blooded, crafty perjuror, Rubin. I hate a crook. I am a lawyer. I am called upon to defend men charged with crime. I prosecuted them. I have defended

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them. I have judged them, and I hate them, but I think I hate a coward more; and you have this fellow Rubin coming here to tell you that even in the last war, desperately serious war for the nation then as this one is now, that he not only dodged his duty when he was called in the draft, but he ducked, as Mr. Barshay indicated to you, behind a woman's skirts; he hid behind a neglected, abandoned wife, and gave as his reason that he could not go to the war with all the rest of our sons or brothers that he had to support a wife, and then this woman—and I would like to shake hands with her sometime, this outraged woman—what is it that Shakespeare said? "Hell hath no fury like a woman scorned"—came forward and said, "This man is not entitled to an excuse. This man is not supporting me nor my child," and the Draft Board immediately shot him up from 4-B, or something like that, to 1-A. He was caught then in that lie when he could not have been more than about half the age he is now. Coward!

11015 Then he was drafted along with all the other decent boys that had to go to that last war. Did he then do his duty? Did he feel sorry that he had perjured himself in trying to evade the draft in the first instance? He did not. He ran away. He deserted his country. He deserted his flag. He ran away and hid himself, so that he could not be called on to take his place in the ranks with the hundreds of thousands of other American boys that had to go to that war and many of whom lie there yet in Flanders Fields. Coward! Coward!

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We find him a few years later, curiously enough, in Germany for two years, our enemy then as our enemy now, Germany doing some business with Russia, mind you, Russia, with which we were on most unfriendly diplomatic relations at that time. There is the start that this favorite witness of the District Attorney had in his adventure in life—Benedict Arnold—coward and shirker and draft dodger. Oh, if he had ended his vileness and criminality then, that would be bad enough, but, oh, no, he becomes a cool, calculating villain that he has shown you, but not villain enough to be barred out of the Bossert Hotel in Brooklyn in March, 1940, and I think he has been there since, March, 1940, or at least that is the time he talked at that place with the District Attorney of this county, and he has been at the Half Moon Hotel too. Did he tell Judge O'Dwyer the truth then about this case and about his record? If so, if he told him what he had done in this case, why wasn't he indicted? The indictment here is available for you to examine. His name is not on it. Tannenbaum's is not on it. Berger's is not on it. Why wasn't he indicted then? Why wasn't he put in jail? Why wasn't he even put before the Grand Jury that found this indictment in May, 1940? That is the curious thing. He was not even called before the Grand Jury. I don't know how this thing works out. Witnesses have been called here to testify that they knew all about this Rosen killing, not put before the Grand Jury until this case was actually on trial before you men, actually on trial, the indictment found, the trial commenced; then

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they are put before the Grand Jury sitting in the months of October and November, 1941. The indictment had been found by that time. Was it because it was thought expedient to let these men gather in the Half Moon Hotel, fraternize together, play cards, dine together, play baseball, so they could get their stories fixed up before they would be put under oath to tell it? Is that the reason they were not put under oath any place to tell their story until this trial was in progress, and were they put before the Grand Jury thirty days ago and less so that they could be told, "Now, if you do not tell this story you have told us before, not under oath, we are going to have you for perjury in addition to this other?" I never heard of such proceeding. I don't think anybody else heard very much about that kind. A murder indictment found a year ago and the principal witnesses, upon whose testimony the District Attorney relies to get a conviction, not called before the Grand Jury until the case is almost coming to a close. I cannot figure that out. Maybe you can.

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Now then, the next witness whose testimony I want to revert to is that of Max Berger. You remember Max Berger did not like his name, as though it made any difference what kind of a name a villain like him carried. You remember his calm admission that he had been a slugger and a strong-arm man all his life; and I say a slugger of the type that he meant and was, who calmly admits that he did the slugging in more than a hundred cases, oh, more than a hundred, was a potential murderer every time he struck

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one of those men who were trying to earn a living at the time he assaulted them. He did not care whether he killed them or not. He did not care whether, when he left them lying in the gutter, they ever arose with a spark of life in them or not. A slugger. Always available, always ready. You saw his violence on the stand. Do you think you would like to believe him about any business affair you had? Would you like him testifying against anybody that was near and dear to you, upon any subject, in a civil suit or a criminal suit?

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How in the name of heaven can any intelligent District Attorney ask twelve men of your type to credit anything these fellows say? You would not do it outside of the jury box, you know you would not, and, gentlemen, you have no right to do that inside the jury box if you would not do it outside the jury box.

Now, this Berger, never arrested, never indicted for anything here, admits—I don't have to argue these things; I am only reminding you of the testimony in this case—admits that he was what they, in their parlance, call the finger man in this Rosen killing; admits that he pointed out Rosen, he says, to Weiss. I have told you it is incredible that Weiss would need anybody to point Rosen out. All he had to do was go and see the man in the store. He could get his description. One-man store, that is all; no clerks, no bookkeepers, no attendants, no counter man—what shall I say, salesman—just this man in this poor little hole-in-the-wall store, and yet Berger tells you an elaborate story that he pointed Rosen out when he came out to fix his newspapers on the stand in front of his shop;

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and he knew violence was going to be done; he knew he was going to be murdered, if he were fingering, which he was not, and he tries to let himself down because he thought he was going to be "schlomed", I think the word was, by beating him over the head, a skull fractured, a brain destroyed in its God-like utility forever. That is all he thought, he was not going to be killed. What nonsense! Fifty to a hundred men he said his assaults have been on others. My question is, if Berger told the District Attorney his part in this case, it made him an accomplice. He was as much the murderer of Rosen as the man who fired the shot, once he admitted that he had pointed him out to people he claimed were the killers or prospective killers of Rosen. If he told his story to Mr. O'Dwyer, as he said he did, isn't it fair and reasonable for you as citizens to expect that the District Attorney of this county would have put that man immediately under arrest and would have caused his indictment as one of the accomplices and, having indicted him and having shown him that he was facing responsibility for the murder, then if he wanted to talk, let him talk. But no, that was not the method used in this case, not the method used at all. He could have been called in at any time. He was under \$35,000 bail, he said, as a defendant in an investigation being conducted by the District Attorney of New York County. He could have been produced at any time, but he was not, until the summer of 1941, this year, when, instead of being put in jail, he was sent to the Half Moon Hotel and kept there, possibly to be pampered and fattened up for his appearance in this trial.

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Let me remind you just of this thing: Was he telling the truth, Berger, or was Rubin telling the truth? I hope you distinguish the two of them. I myself get them confused once in a while. Berger was the big, burly, violent fellow who went through the dramatic episode there, banging the Judge's desk. Was he telling the truth or was Rubin telling the truth about the receipt of money by Rubin? You remember Rubin testified that every week he got \$50 sent to him; when he was in Salt Lake City, or wherever else he was, he got the \$50 sent to him. Berger testified that he handed that same money to Rubin right here in Brooklyn or Manhattan—very definite and very positive about it—gave it to him when Rubin came back from Salt Lake City, handed it to him; repeatedly said he never sent him any money by cash or check or money order but always handed it to him here in New York; whereas Rubin went right down the line, asserting that every \$50 he got was sent to him by somebody in Salt Lake City; so they cannot both be true. One or the other is lying. It simply indicates that they slipped up on their story in that detail. They had not expected that would come out, but it just shows you their propensity to lie. Take either horn of the dilemma, take either one you like, one of them is lying, and if he lied about that, what is to prevent him from lying about the more important things in this case? The important thing in their case is try to satisfy the District Attorney about the defendant Weiss, for whom I am speaking, in this killing. That is what they wanted to do. That is what they are trying to do. In back of it

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all looms their intense anxiety to save themselves as well as to keep out of jail since 1941.

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Why Berger was not indicted for this crime is pretty difficult to understand. He was allowed to walk around from the time the investigation was started up to the summer of 1941, and I, for the life of me, cannot understand this—this is testimony that The People brought forward now—Rubin, Max Rubin, fleeing to Salt Lake City, being reprimanded for not staying there, going somewhere else, and coming back again. Here Berger was the finger man in this case. Berger was the man that knew more about the case, according to his own statement, than Rubin did. Why wasn't he the one that was sent away to flee the jurisdiction of Brooklyn or New York? He floated around New York, large as life, with his automobile. No question about his going away. No question about Lepke or Weiss or anybody else sending him out of town. Oh, no. He just sauntered around until the summer of 1940, when Coney Island looked pretty good to him, and he had himself, at the expense of the County of Kings and the taxpayers thereof, lodged as a guest in the Half Moon Hotel. I don't know why Rubin was the man that had to do the fleeing, while Berger stayed around here in the City of New York with his \$150 a week. Pretty good money. I employ some pretty fine lawyers in my office for much less than \$150 a week, college graduates, trained men. Berger, getting \$150 a week!

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I don't know whether I can make this plain to you out of the mass of testimony, but it is of tremendous significance. I want you to recall Berger's testimony of being in Brooklyn with

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Weiss until after eleven o'clock on the night that he bluntly admits that he fingered Rosen. I hate their expression, but that is theirs—you have heard it so often—pointed him out as a prospective victim. Bear in mind that he testified that he lived in Brooklyn. He swore that when he and Weiss finished their business in front of Rosen's place, this pointing out of Rosen, that Weiss drove him back to New York. Then when he, Berger, remembered that he had testified that Lepke had brought him down in a taxi to meet Weiss on the East Side, he tried to cover that up by testifying that he had left his car on the East Side; had to go back to Manhattan, although he lived in Brooklyn, that night after eleven o'clock; although he had to go back to Brooklyn he testified he came up to get his car, which he testified he left on the East Side of Manhattan, which East Side he described as 12th Street and Broadway. 12th Street and Broadway I know and you men know has never been described as the East Side of New York since Peter Stuyvesant was stamping around in Dutch Colonial New York. It just could not happen but he felt he caught himself in a trap. They had not checked up on that between themselves, and that is how he covered himself up.

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Let me tell you another discrepancy that I want you to bear in mind as of tremendous importance, and because of the hours and the dates here I have got to read this: Rubin testified that he saw Lepke in the early afternoon of September 11th, Friday, this day we are talking about of Berger going over there to the car, in the car with the lights lighted, after he and

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Weiss had arranged to go over there. During that conversation he says that Lepke hinted that Rosen should be killed—why I still don't know, still don't know; it has not developed in this testimony—that Rosen should be killed to stop him from talking. No evidence here that he had done any violent talking. The District Attorney of Manhattan's representative was here and said they did not know and never heard of him so far as their records were concerned. Rubin then suggested that he would go to see Weinstein, a Union official, and find out whether Weinstein could do something to stop Rosen from talking. Rubin then left Lepke, so he says, and saw Weinstein and returned and said Weinstein would do nothing, and it was then, according to Rubin's testimony and apparently the prosecution's theory, that it was determined that Rosen should be killed and that Lepke gave Rubin, he says, the truthful Rubin, a message for Berger, that he wanted to see Berger, which he did. That is Rubin.

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Berger then testified that Rubin delivered the message from Lepke and he saw Lepke on Friday at about 5 p. m.; that Lepke and he took a cab to the East Side, where they met Weiss at about 6 p. m., six o'clock in the evening, at which time Berger was told to finger Rosen for Weiss. According to Berger's testimony, Lepke then left, and Berger and Weiss went into a restaurant, had something to eat. You remember he said it was getting dark about that time. He testified further that it was absolutely dark when he and Berger reached the neighborhood around Rosen's store; he stated that the lights

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were lit on the way to Brooklyn. Berger then pointed out Rosen to Weiss, and then they drove back to the East Side, 12th Street and Broadway, where they arrived at about eleven or twelve o'clock at night. Of course, if there was any truth in that story, after Berger had gone with Weiss all the way over to Sutter Avenue, the locality of the Rosen place, Weiss would have driven him home here in Brooklyn. You know Berger did not figure on that, and so he had himself being driven back all the way to 12th Street and Broadway to get his car that he said he left there.

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You cannot reconcile that testimony of Berger's with the testimony of Bernstein. It just cannot be done, because Bernstein—let me bring you back to one of the earliest days of this case—Bernstein testified he was seated in his car about one o'clock in the afternoon, talking to Strauss—remember?—at Sackman and Livonia, in Brooklyn, and that Weiss, the defendant Weiss, together with Capone and Farvel Cohen approached his car—that was Friday, September 11th; the killing of Rosen was on Sunday, September 13, 1936—and it was then at one o'clock in the afternoon, says Bernstein that Strauss told him, Bernstein, to steal a car and to provide a drop, a depository for the stolen car; and Bernstein further testified that he met "Muggsy" Cohen about three o'clock in the afternoon and made an appointment for one o'clock the next morning to steal that car. One o'clock in the afternoon, three o'clock in the afternoon,—but that was long before, according

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to Rubin's testimony, it had been determined at all to kill Rosen. That all happened at one o'clock or two o'clock or three o'clock in the afternoon, whereas, according to Berger's statement, he was told to meet Weiss and finger Rosen late that evening, six or seven o'clock; it was dark when they started out to go to Brooklyn. You just cannot fit those times in. One story or the other is false. You take your pick as to which you believe. I say you cannot believe either. I say that it is incredible that Weiss could have made any arrangements with Bernstein, Strauss, or Capone Friday afternoon because he was not finished with Berger until eleven or twelve o'clock that Friday night on the East Side of Manhattan, according to his description. And so we leave Mr. Berger. I don't think you can believe him. I don't see how, in heaven's name, you can believe anything that he or any of the rest of them say, and if you do not believe them you cannot convict these defendants.

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Now, I do not know whether you got the shock that I got when this man Tannenbaum appeared on the stand. He looked like a tragic mask, a long yellow face. Tannenbaum is relied upon, curiously enough, as the main corroborating witness in this case against Weiss, and unless you put full credence and belief in what Tannenbaum says, of course, under the instructions of the Court, you cannot convict. How about Mr. Tannenbaum as a corroborating witness to anything? Remember that yellow, ghastly face that he had when he appeared here? He is the man that participated in six murders.

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he says. He says in the murder of Solomon Goldstein he helped to dump the body into a lake after the murder. In the Ashkenas case he admits doing the shooting. In the Yuran case he admits driving the murder car. In the Plug Schuman case again he admits that he drove the car. In the Harry Greenberg case, the murder of Harry Greenberg, he says he covered the car for the man who actually fired the shot which killed Greenberg. With them, covering the car means to be ready to interfere with any pursuit that gets in the way, even though there be a smash-up with the police car that is pursuing; block off anybody who he thinks interferes with the escape of the murderer, ready to do murder in that instance if necessary, crash any car, destroy anybody's life, in order to let murderers get away. That is what these gentry call covering a car. He admits he did that in the case where Harry Greenberg was murdered. He admits that he pointed out the victim in the Whitey Friedman murder and that he was the finger man in the Diamond murder. Imagine a man coming before twelve men—when I say twelve, I hope you alternate jurors won't take offense, because only twelve of you are going to decide this case—coming before gentlemen of your type and asking you to believe, and recounting these kind of things that I am now retailing to you. It just does not seem credible. It does not seem as if we are living in the Borough of Brooklyn, in a civilized community, when men can come on the stand and in one breath ask you to "believe what I say," and in the other breath say, "and these are the murders I am admitting that I committed." Lord knows how many others

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that they don't admit, but these are the ones they admit. Finger man in the Diamond case, and the District Attorney is going to ask you to believe what he says about this case. How can you do it? How can you do it? Allie Tannenbaum! I am wondering if it is not Tannenbaum who killed Rosen, the man who is lighter in weight than Weiss that was described by Mrs. Rosen when she came on the stand. I am wondering if he was not trying to save himself from possible consequences of his seventh murder by putting it on Weiss in order to distract attention from himself. One more murder, or one murder more or less is not going to make any difference in his young life.

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Is this the reason that they are testifying as they are in this case, to distract attention from some of their own mob, some of the people who are either in the hotel with them or have been, by seeing to it that others are convicted of the crime which they themselves committed or knew who did commit? I am telling you, when you get to analyze the motive that these men have in testifying as they do, and when you consider that they are doing that to save their own lives and the consequence of their acts, you cannot have any greater inducement for the commission of perjury than what you have had in this trial. As I say, I am oppressed with the responsibility that is being put upon you when you are to be asked, as you will be asked from this table, to believe the testimony of these murderers, these devils that have been testifying here under the mockery, sham, the sacrilege of the oath which they took to tell the truth.

This man Tannenbaum is the man who was

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talking to District Attorney O'Dwyer long before Weiss was taken into custody at all and long before Weiss was interviewed by the District Attorney. Did Tannenbaum tell the District Attorney of this county the truth when he was talking to him over a year ago? If he did, Weiss would never have been permitted to walk around the streets of New York or to go to Chicago or California or anywhere else. He would not have been permitted to dine in a restaurant with Major Kleinman, with a group of policemen around, including the Police Commissioner, and walk out of that restaurant without handcuffs on his wrists. Let us just, if we can— I cannot; I don't think you can—pass over for a moment the six murders that he admits, this man Tannenbaum, the corroborating witness. How about his additional crime of perjury in addition to his six murders, or possibly seven murders? How about his being a perjurer? Well, the record shows that he admits perjuring himself before the Federal Grand Jury right here in your county. He testified that he knew Weiss only slightly in September, 1939, and here were the questions he was asked and the answers that he made on this point— this is before the Grand Jury in 1939, having taken the oath to tell the truth, all of the truth, and nothing but the truth:

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“Q. Didn't you testify before the Federal Grand Jury that you only knew Mendy Weiss slightly? A. Yes, sir.

“Q. That was false, you say now? A. Yes, sir.

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"Q. That was a deliberate false statement you made to the Federal Grand Jury? A. Yes, sir.

"Q. Do you remember when it was? A. September, 1939."

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If he was telling the truth then, he only knew Mendy Weiss slightly, and Mendy Weiss, if he only knew Tannenbaum slightly, was not likely to be implicating himself, Weiss, in with Tannenbaum, a man who was almost a stranger to him. Either that was true or it was false. He says it was false, and, if it was false, he knew that he was committing perjury before the Grand Jury. Now, what is the difference between committing perjury, swearing falsely, before that Grand Jury in 1939, and committing perjury, swearing falsely, before this jury in 1941? You see, they are like rats. They are cornered everywhere they turn. You see, they are able to point out things of this kind to you, and I ask you how in God's name you are going to believe anything they say. How are you going to do it?

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This man Tannenbaum they have had in custody since March, 1940, a long while to work up a story, a long while for him to figure out with these others that are there how he is going to get out of this situation he is found in, how he is going to save his own worthless self. Since 1940 he has been in custody, a man who was taken up-state and visited there by the District Attorney and by his Assistant, Mr. Turkus, and then later went before the Grand Jury and testified falsely and committed perjury. Of course, he has been in a hotel. This seven-time murderer never served a day in jail in connection with any of the seven murders, never. He, as far as I

know, never was indicted, never even had to answer an indictment, and seven murders,—pretty good. I don't think Bluebeard did very much better than that, did he? Jack the Ripper only had one, and he was desecrated by the world for many years, when I was considerably younger. Seven murders! Not in jail! Oh, no. In the Half Moon Hotel, with Bernstein, with Reles, with Sycoff, with Rubin, with Berger, occupied the room next to Reles, if you remember, the very next room, the night before he was called here to testify. Tannenbaum! Gentlemen, you cannot, you cannot and would not convict the proverbial yellow dog on the testimony of a man like Tannenbaum. Any District Attorney should be ashamed to ask you to do it. It is too much of a burden to put upon men of your type. You had to give up your homes, your business, the ordinary comforts of life that we all enjoy, for all these weeks, sitting in this jury, instead of being home and coming in here every morning to do your duty, as you are willing to do. No, you are segregated from the rest of humanity. Who is going to attack you? Who is going to approach you? Who—

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The Court: Please. I must interrupt this.

Mr. Talley: I am sorry that you feel that you must.

The Court: This must be stopped.

Mr. Talley: The heaviest burden is placed upon you by being asked to believe the testimony of witnesses such as this type that you have seen, you have heard. I am merely trying to recall them to you.

The Court: Pardon me just a minute.

Gentlemen of the jury, the purpose in your

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segregation is not that the Court wanted to impose a hardship at all. It is to keep you from becoming prejudiced against the defendants by reading newspapers and listening to expressions of opinion. This is for the benefit of the defendants and to assure that they will have a fair trial, so that you will judge the case solely upon the evidence and have discussions among yourselves, not among members of your family and friends.

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Mr. Talley: Will your Honor advise the jury, if your Honor pleases, that this segregation was not at the request of the defendants or any of their attorneys?

The Court: I don't have to advise that. The Court does not have to ask the consent. The Court is here to administer justice and is not subject to attack upon summation. Don't do that again.

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Mr. Talley: The next in this array of witnesses was Seymour Magoon. You remember him, the swarthy little "fifty-or-better" man. Something happened to Seymour Magoon. He did not make the hotels. He is being held in Bronx County, in the Bronx County Jail, because he was unfortunate enough, the poor boy, to be implicated in a murder in the Bronx. I think they have a good hotel up at the Grand Concourse in the Bronx. They must have several in the upper part of the Bronx. This criminal is not lodged in a hotel. He was lodged in the County Jail. He was a more ignorant type than the other witnesses who were called by the District Attorney but none the less cunning. He is the man who said he dressed himself up as a

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laborer and for five days hung around in front of Rubin's house to get a line on his habits and customs, knowing that he was to be killed. He is the man that went into Child's Restaurant while Berger, cold-blooded Berger, sat down and had a meal with the man whom he was to point out to Magoon, sat down, broke bread with him, solely for the purpose of indicating that Rubin was the man to be shot. This is Magoon. Day after day sat around in what he regarded as disguise, a laborer's dress that ought to have been an honor to him to wear instead of the fancy clothes that he and his type always manage to effect. He is the man who met in Child's Restaurant his proposed victim and then went with a man named Cuppie Migden to find Rubin. He followed him with a car, went up to 17th Street and 5th Avenue. He followed Berger. Again, they both had cars. In that neighborhood Rubin was pointed out to him; stayed around all that day and saw Rubin return at five o'clock in the afternoon; tried to tie Weiss into this case, because that is why he was called, by stating conversations that he said he had with Weiss about the Rubin attack, and you are asked to believe what he says Weiss said. There is no easier way for this type of perjurer to give testimony than by saying he said something to him. You don't have to describe a room or a place or a store, the physical facts about which could be demonstrated and shown that he was telling a falsehood. The easiest way is to get an admission, to have him testify that the defendant said this or said that to him. Nobody can contradict that, you see. They say, "He said

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this, he said that." When I say nobody can, I mean no physical facts can contradict that.

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So the first thing you have got to question yourself about Magoon, is he worthy of belief? It all comes down to this in the case of all the witnesses. Here is a man who admits he stole fifty automobiles or better and admits that he participated in murders in Brooklyn and the Bronx. He admits that he was the driver of the car in the Friedman murder and he participated in the Bronx murder of Penn, upon which he is now being held, but, with the charm that exists about these so-called informers, although implicated in the murder by his own admission, he is only being held as a material witness, the same as you or I might be held in a case in which we might happen to be an innocent bystander. He says on September 4, 1939, he participated in the killing of Irving Feinstein and helped the defendant in that case to dispose of an oil can, the contents of which had been used to burn the body of their victim. This is the man who naively

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stated he would not tell a lie to save himself, just one, and that during all his life he had never told anything except little white lies. That expression coming from that gorilla I never will forget to the rest of my days. He never told anything but little white lies, and he expected you to believe it, the same as he expected you to believe—and there are a thousand reasons why he should expect you to believe—he is vouched for by the District Attorney—he expected you to believe that statement just the same as he and the others expect you to believe their story

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about the participation of the defendants in this case.

What fools we must all be taken for. Maybe Puck was right, sitting on the top of a cowslip, looking over the world and saying, "What fools we mortals be." What fools they must take us for, to think that any jury would believe the testimony coming from the polluted, blackened lips and hearts of men of that type.

He testified that the first one he spoke to in O'Dwyer's office was Mr. Turkus and Mr. Klein, in 1941, and at that very moment he was involved in the murder in the Bronx in which he admits participating. Is he making what he regards as a pretty good deal for himself by getting freedom from responsibility in the Bronx killing by testifying here? He thinks he is, but there is one part of the deal he has not yet reckoned on, and that is this jury here. He thinks he is going to be credited and he believed and then for the service he has rendered The People, the District Attorney of Brooklyn will convey his compliments to the District Attorney of the Bronx and say he rendered great service, he fooled this jury, he made them believe his lying utterances, despite his record as a murderer and a thief, and so we will have to give him consideration.

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I must hurry along, because I want to finish before the usual recess hour, and that I will do. I want to call your attention, in passing, to Special Agent Albert Aman, who was called here solely for the purpose of—and this will be made much of by the District Attorney—proving flight.

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The District Attorney is going to tell you that only guilty men flee. Of course, that is not so. He is going to tell you that flight is confession. That is not so either, as has been demonstrated thousands and thousands of times. But they are going to say, "Well, the corroboration"—pretty solemn testimony we have here from these liars and perjurers and crooks and thieves and murderers, but we have got corroboration now; Weiss was running away. Well, I ask you

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to consider the testimony of Special Agent Aman as evidence that if Weiss was running away it was from nothing having anything to do with this Rosen killing. There was some testimony given here about a Federal charge against Weiss. These agents were interested. These men who are sitting on either side of Weiss now are Federal agents; they are not New York police officers; they are not under the control of the District Attorney; they are Federal agents. The testimony indicates that he is brought here every day from the Federal House of Detention in West Street, Manhattan; he is in the custody of Federal agents, and I say that this testimony of Aman shows that Weiss, if he was trying to keep out of New York—and I

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don't dispute that he was—and as such was using an assumed name, because, as one of the witnesses said, he was afraid he was framed—he was being framed by a witness in a Federal case.

Aman made this significant statement, and he was backed up by his associate, Agent Bell: that when Weiss was apprehended in, I think, Kansas City, I am not sure, he waived extradition, and

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both of them say that they asked him whether he wanted to be brought to New York or Texas and both said that he said he wanted to be brought to New York.

Now, is it within the range of probability or possibility—and you have a right to consider the probabilities in this case at every point; that is where your experience comes in as business men—is it within the range of probabilities that if Weiss was fleeing from a murder case he would have asked these Federal agents to bring him back to New York, the City of New York, the Borough of Brooklyn, precisely where he would be amenable to the authorities in Brooklyn? Oh, no. You know that he would have said, “Take me out to the Lone Star State of Texas. I will do better out there on this Federal charge. It is not murder. I will do better out there with the Federal Court than I will in New York if I have got to face a murder charge.” So that I submit to you that there is no evidence in this case, no credible evidence, that will justify you in any way in inferring that Weiss was out of town in 1940 or 1941 because of the Rosen case. They tried to hook that up rather definitely, very definitely, by having someone say that Weiss said, “Tannenbaum was talking and I will have to beat it” or “take it on the lam.” That is the way they hooked that in. Here is the evidence. That is what Tannenbaum said. As against that is the evidence of these two Federal agents who said he was quite content to be brought to New York instead of going out to Texas on this Federal charge. I think that evidence is of tremendous importance.

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Now, Weiss says that he was not present at the Rosen store on Sunday, September 13th, and through the lips of his wife, his two brothers, his wife's friend, and his mother, he gives you the testimony as to where he was. Sunday, the 13th, the day upon which Rosen was killed by somebody, maybe somebody that had testified from that witness stand, that day was his birthday. I had not launched on that testimony for five minutes before the Court said, "Have you got a certificate of his birth?" Well, I was hoping somebody would ask me that, and the Court obliged me, and we had it, and it is in evidence. It shows he was born here in the City of New York on the 13th of September. And you heard the testimony that they remembered this birthday, his twenty-sixth birthday, on September 13, 1936, because the old mother, the old lady, said that Mendy and Sidney had had a little row a couple of weeks before and she wanted the boys to be friendly and patch it up, and she suggested that they have a party. They started their party, as is the custom of that type of people—nobody will deny that—on Saturday night rather than Sunday, that is, they started at ten o'clock on Saturday night, the 12th, and carried it on until the morning of the 13th. You heard the testimony; you had an opportunity to look at the witnesses. Are you going to believe these murderers and cut-throats, these finger men, these perjurers? Are you going to believe them in preference to these people who testified as to where Weiss was that night? I don't see how you can. Of course, it will be said that to prove his alibi he had to

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bring his own family, those who were nearest and dearest to him: his mother, his wife, his brothers, his wife's friend. Of course they are willing to testify falsely in his behalf. That is human nature. You almost have to blame human nature for that. But you saw them and you heard them. No record of perjury with them. No record of murder with them. No fingering victim with proposed crimes with them. No thefts of fifty and hundreds of automobiles with them. They were just people, true to the type of the East Side of New York or what you have in a similar section here in Brooklyn. Who else could be called upon to testify about a birthday party except our intimate friends and our family? We don't celebrate our birthday parties with strangers, do we? We celebrate them with those who are near and dear to us. And that is what this family was doing on that night. You have no right to reject their testimony. You will be asked to regard it with suspicion, but, as I say, gentlemen, who else is there that he could call to testify except the members of his own family. He was there with his old mother, who was pleased and happy that the row had been patched up between the two boys, and she was going to be a sport that night, in her joy and jubilation, and not only go to the restaurant and moving pictures, but take a ride through Central Park. She lives over here in Brooklyn. So don't be swayed by the argument that he had to call his immediate friends and relations and those closest to him to prove what will be scornfully referred to as alibi, which is just a Latin word meaning "elsewhere," that

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is all. Because the fact remains, gentlemen, that it was his birthday. It was his birthday. And the records of the Department of Health of the City of New York show it was his birthday. Nothing they say is going to change that. This thing was not grabbed out of the air. It does seem to me, in the last analysis, that the thing for you to consider is, Whom are you going to believe? Whom are you going to believe? Are you going to throw their testimony out as false and perjured, and are you going to take the testimony of these murderers and thugs who have testified to a condition of affairs that, if true, if true, would show that Weiss, instead of being at his home, with his mother, with his wife, with his wife's friend, the poor creature,—believe the murderers,—believe Weiss was over at Rosen's place; believe these; you will say he was there where they say he was, and back of that looms the certificate, which you may take into the jury room with you, showing he was born on the 13th of September, about 1910.

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Gentlemen, I have about finished all that I wish to impose upon you in this case of The People against Mendy Weiss. Bear in mind that we are in the same position here as if he was the only defendant in this case. We wanted a separate trial for him. The Court in his wisdom determined they would have to be tried together. It would have been very much easier for us to try this case with one defendant than with three, would not have had all this panoply of power, policemen with gold shields and handcuffs. I have done the best I can for him. My responsibility is about at an end. Your re-

sponsibility is about to commence. I say that it would be a very terrible thing for this County of Kings, this Borough of Brooklyn, your home, and this City of New York, if the crooks and criminals of the type that have testified in this trial are going to be given notice by your verdict that they can perjure, they can steal, they can murder, with impunity, so long as they reach the District Attorney's ear first.

We are living in weird times, weird times. We are living in danger, dangerous, hazardous times for the well-being of this country, and I know nothing is going to undermine the foundations of our American system of government more certainly and with more deadly effect than just that, a notice that twelve gentlemen of your type would be led to believe the testimony of men whom nobody would believe and nobody should be asked to believe, whose records, whose admissions, whose character, whose appearance, whose everything, belie every attempt of those who called upon them to testify to be believed as honest or reputable or decent men should be believed. Don't be carried away, gentlemen, by the things you have seen in this court-room. Just stick to the evidence in this case. That is what I want you to do, just stick to the evidence in the case. Remember the character of the people who have given it to you. Remember that you are now called upon to use your common sense—oh, I insist upon that so much—and weigh that common sense in the light of the probabilities in this case. Consider the animus that these men have, the motive they have for testifying falsely, that greatest, that is, the most

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overpowering of all motives, to save their own worthless lives. This life of ours that can be snapped off so suddenly, and how we struggle to save it. To me, of this type, nothing will stop them, they who will murder, they who will call on God to witness the truth of what they say and then lie; nothing will stop them in their endeavor to save themselves, and that is what they have been doing in this case.

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Gentlemen, I am very grateful to you for your attention to me. I am sorry I have had to take up so much of your time in reviewing this testimony. I know you are going to do the fair and decent thing. You will try to do the fair and decent thing. I ask you that your verdict will be a verdict of not guilty so far as the defendant Weiss is concerned.

The Court: The Court will remain in order.

We will recess for lunch until 1:30, and I am going to ask you, in order to avoid too much crowding this afternoon, if we may all be here promptly at that moment.

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Gentlemen of the jury, please do not discuss the case, let nobody talk to you about it. Keep your minds open.

Defendants are remanded.

(Whereupon a recess was taken for luncheon, until 1:30 P. M.)

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AFTERNOON SESSION.

TRIAL RESUMED.

Mr. Rosenthal summed up to the jury, on behalf of the defendant Capone, in the following language:

Mr. Rosenthal: May it please your Honor, Mr. Foreman and gentlemen of the jury, I would also be remiss in my duty if I did not, just as the Judge, Mr. Turkus, and all of counsel will do and have done, thank you gentlemen for the long and arduous task that you have had and for the great attention which you have paid to the testimony in this case. You have not seen much of me during the trial but I hope that you will bear with me in the summation which I intend to give on behalf of the defendant Capone and Capone solely, he being the person to whom I am responsible and he being the man whom I will direct all of my argument to you about.

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When you were taken,—it took a very, very long time to select fourteen men who will subsequently be reduced to twelve,—from the vast majority of the citizenry of Brooklyn who said at the time that irrespective of any opinion that they may have formed or anything that they may have read, they on their oaths as jurymen and on their conscience as men will fairly deliberate the guilt or innocence of each and every defendant in this trial. For the defendant represented by me, that is all I ask. Counsel have already taken care of the defendants represented by them.

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A number of men have never been called to

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serve on juries before so that it would not be remiss for me at this time to, in some brief manner, remind you of some of the things which you might have given very little thought to and to remind you of some of the questions which were originally asked of you before you were accepted as jurymen. At that time possibly you may have thought the questions a little bit ridiculous but now you can see the reason motivating each counsel in having addressed you and asking you the questions they did. This trial is divided, in reality, into four parts, the part played by the District Attorney, the part played by defendants' counsel, the part played by the Court, the part played by you. Each one has a responsibility. The greatest responsibility is yours. All the District Attorney had to do was to present to you what was given to him, the Grand Jury having found an indictment which at this time is meaningless, as will be explained to you by the Court in charging you on the law, and if those witnesses fell down, he cannot be heard to complain. All defense counsel is called upon to do is to fairly and adequately represent the cause which they espouse and each one has conscientiously done that. The District Attorney is a paid advocate. He is paid by the State. He is paid with your money, my money, the defendants' money, the Court's money. He may be paid by individuals and, at times, we are not paid at all but the cause which we represent is just as great as the cause he represents. These defendants are an integral part of the State of New York which you represent and which he represents and so, passing that, we come to the

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defense counsel who presents such evidence as he may see fit to present and conduct the trial as best he sees fit to conduct it. I have conducted this trial on behalf of my client in the manner which I considered was the proper manner in which it should be presented. In deliberating in your jury room—and this may sound asinine—there is no reason why you should permit the entity of counsel to enter into your deliberations at all. We are not on trial.

The third branch is the branch of the law. If the Judge makes a mistake,—and you have probably heard us except on numerous occasions to his rulings,—a stenographer is taking down that mistake. We feel that this case should not be reviewed any place but in the case where the error committed by the Judge is of a substantial nature, if it perchance leads a jury into finding a verdict of guilt, there is a way of remedying that mistake because it is impounded upon the record and the exception of the counsel is open to review at a subsequent time. So you see the defendants are protected as against the Court who, using all its conscientious endeavors, may still err, because none of us know all of the law—I know but little; as long as I have been in it I find that I know very little because if that were not the fact we would not continuously argue among ourselves as to what is right or what is wrong in so far as a principle of law is concerned. But we are protected against such a mistake and, once Mr. Turkus sits down, his job is finished and once I sit down my job is finished, and once the Judge tells you the law, whether you like it or whether you

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don't like it, you must accept that when you go into your jury room and apply it to the evidence as you see it. But once the three responsibilities are over, then the hard job begins because you men, taken from all walks of life, moulded into one thought, if possible, are the ones who have the final say as to whether the facts in this case, the believable facts, warrant you in justifying a verdict which you will subsequently render either of guilt or innocence; and as to that verdict, it is not open to censure, it is not open to complaint, it is not open to scrutiny, it is not open to ridicule, if it is based upon your conscience and there is no outside influence which in any way caused you to determine in the manner in which you did. So you see in the final analysis, the greatest responsibility in this case is going to be yours.

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I won't go any further. Judge Talley explained in great detail on that particular point and the difficulty in a case where there are three separate counsel is that one counsel may have to repeat one or two or more matters in the interests of his client and then it might become boresome to the jury, but it does not add any greater weight because Mr. Rosenthal said it and Judge Talley has said it before. So I am going to try, in defining this evidence, to keep away, in so far as is physically possible, from the things that have been dwelt on by competent counsel who have preceded me, Mr. Barshay and Judge Talley.

You are called from what they call a special panel. Due to the fact that some of you have never served before, it might not be amiss to

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tell you that the word "special" has no meaning or significance other than the fact that, by calling men of a particular type, time is saved in the examination of jurymen; whereas, if men who had not signed a questionnaire, were called, taking into consideration the length of time that it took to get a jury in this case where men are called from a special panel, the probabilities are we still would be questioning the jurymen rather than having the case coming near its conclusion; but once you are accepted as a jurymen, the word "special" must be excluded from your mind. You are now jurymen, no more, no less. Your deliberations must be in calm, cool, deliberate manner, laying aside anything except evidence and law as charged by the Court. You are going to take the evidence from the witnesses, not from what I say, not from what Mr. Turkus says, and not even from what the Court says, because, as I told you before, the case is divided into four parts. The Judge's only province is to tell you the law. In telling you that, he may refer to some isolated instances of what he believes to be the facts but he will tell you that that is not binding on you; you are the judges of the facts. You are just as much a judge in this case as his Honor, Judge Taylor. He decides the law exclusively, whether you like it or not, and you decide the facts exclusively, and I say this in no term of disrespect, whether he or anybody in this court-room likes it or not. So that, in judging the evidence, you are going to say what you consider to be important and you are going to say what you consider to be unimportant.

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Passing that, how is it that you are brought from your business to this particular court? You are brought because an indictment has been found charging these defendants with a crime. When the defendants entered a plea of Not Guilty, they raised every issue that was set forth in that indictment. The Court will tell you that indictment is meaningless except as a means or mode or orderly way within which to bring people to trial, the same as is done in a civil case where, if someone were to contend that you owed him money whereas you in your own mind knew that you did not, the orderly way of proving it is by him serving you with a summons and complaint charging you with the money that is supposed to have been loaned to you and you put in a denial and then it comes into a court. So, I say, that the indictment must be dismissed from your minds. Well, then, if that is dismissed from your minds, what is the next consideration which should be in your minds? In viewing this case, gentlemen—and we cannot question the wisdom of years and years of experience of men such as Judge Cardoza and other learned men of the bench, Bar and Legislature as to the rhyme or the reason why these things happen, but you can take it for granted that there is a mighty good reason,—even as these men sit here now, your mind must be free and open and you must presume their innocence. That presumption follows them even into the jury room and can only be removed when twelve of you agree among yourselves that it has been removed because the District Attorney has taken a burden, assumed it and

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proved it. That burden which he has assumed is one to prove the guilt of the defendant beyond a reasonable doubt. Well, the Court will charge you what a reasonable doubt is and anything that I might say as to the law you will disregard. My only reference to the law, gentlemen, is to better enable you to follow the analysis of the testimony as I intend to give it to you and better enable you to see whether or not the District Attorney has, as he has promised you at the outset of the case he would do, met that burden of proof which the law places upon him to prove each and every defendant's guilt beyond a reasonable doubt. When that is done it is not only the question whether you are in the jury room of determining what witnesses have been called. You can also take into consideration the failure to call witnesses that may be available. You will see the significance of that remark as I go on in the summation which I intend to make. You can take into consideration the demeanor of the persons on the stand, their contradictions, their background, their motives, their interests, anything that would enable you to better sift the evidence and ascertain where the truth lies in this particular case. To better enable you to follow me, the Court will charge you, in substance, that no man can be convicted upon the uncorroborated testimony of an accomplice. There is nothing mysterious about a definition of that character. It means this, that when the Judge tells you that Bernstein is an accomplice as a matter of law, the Judge means that if that is all the evidence that you were to find in this case that was believable, assuming

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that you did believe Bernstein, that even then you could not find a defendant guilty because our law does not permit one to speculate on the truth of an uncorroborated accomplice's testimony and so it is that if two or more accomplices were to tell you the same story, there still could be no conviction in your minds. You must look to an unpolluted source for evidence tending to connect the particular defendant with the crime before you can find him guilty.

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I told you at the outset that my defendant is being tried for this crime, and that I am here to defend, that and that alone. He is not being tried for any association claimed by the District Attorney, if he so claims, anything that may or may not have been brought into this case in an attempt to prejudice the atmosphere or your minds against any particular defendant at all. He is being tried for this crime and for this crime I am defending him. Your minds individually must be convinced of his guilt, and never mind any statement that the District At-

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torney may make to you about the fact of hung jury and so forth. If it were not for the fact that the law presumed that twelve men's opinions should be moulded into one, there would be no necessity of having twelve men. We could just as well have taken one juror, the foreman, and let him decide the guilt or innocence of the defendants. Don't let him fool you by any statement or summation he may make that the defendants are looking to hang the jury. I say openly to him and to anybody else that any jurymen who has an opinion in this box who would take that opinion and throw it aside merely because numbers might be against him

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is not worthy of the oath which he takes and would be a moral coward because it is his conscience that is involved when he goes into that jury room to vote on the guilt or innocence; but I say further than that, any jurymen who will not listen to the reasoning or logic of any other man to see whether or not, perchance, his opinion might be wrong, or will not try to convince the other man that the opinion which he has gained is a correct one, would be just as much a moral coward. So that when you go into the jury room be sure of one fact and one fact alone, that what your duty is is to find on your conscience where the truth lies and whether it substantiates the charge or does not substantiate the charge.

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Oh, I anticipate what Mr. Turkus is going to do. You see the difficulty that defense counsel are under is quite an unsurmountable task. Three defense counsel get up and they tell you their theories of what is or what is not proven in this case and Mr. Turkus, rightfully, takes a paper and a pencil and, whether he is doing a cross word puzzle or whether he is actually writing down what we say I do not know, but in any event the pencil is on the paper and he is writing, and when he gets up he will say, counsel did not tell you about this. Why? And counsel did tell you about this. This is my theory. The answer to the "why" question, if he says that we did not tell you about it, is this: In two or three hours' time we could not very well tell you everything that happened in about five weeks, could we, so we take what are called the high-lights; and if he tells you that

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when we said so-and-so the answer to it is so-and-so, well, the answer to that is that maybe his logic is founded on a wrong theory and ours is on the right theory. In the final analysis, that is going to be your job to determine whether what I say is borne out by the evidence or what he says is the conclusion drawn by him is borne out. But what he is going to do, if I know him, as soon as I am finished—and I don't think that will be today, as far as his job is concerned—

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there are going to be 56 photographs lined up, down here, probably extend to here, and he is going to shuffle papers out in front of you and then he is going to say to you, "Look at the trial that Buchalter, Weiss and Capone got. Now compare it, gentlemen, with the trial that Mr. Rosen got in his candy store on the night of such and such, and such and such, when this episode occurred." There can be only one reason or motive for that, sir. I am going to answer it. I anticipate that. He will probably

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leave it out this time because now, being wise to him, I am answering it; but in the event he does not leave it out, we are not interested here in any trial that Rosen got because I will tell you, and I will state this on behalf of my client and myself, I am not in accord with anything that happened to Rosen; but the issue in this case, Mr. Turkus, is whether my client Capone had anything to do with it. The method of procedure used by the killers of Rosen has nothing to do with the issue in this case. It is whether Capone had anything to do with the killing that is the issue. Then he is going to tell you about the line of photographs and the number of wit-

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nesses and the parade which was had before you. That being his job, now my job is to show you what that parade amounts to, in so far as my client is concerned.

There are about 4,000 pages of testimony in this case out of which, I dare say, that if I were to read it—and I was only interested in getting the transcript of two of the witnesses so I am not able to read it verbatim,— I could take the lines out of less than a hundred pages and quote where the issue is supposed to affect my client. Yes, I am exaggerating; I am exaggerating. I think that I would be safe in saying less than forty pages have a line or two—and when he writes, I am going to answer that; I am going to guess what is in his mind; he is going to tell you, well, the testimony of Mrs. Rosen, the identification of the body, the killing and all of that, affects Mr. Capone. It only affects him if you believe Mr. Capone had something to do with it. It does not affect him at all because the issue in this case, when you come down to it, is three-fold. The District Attorney must first prove by competent evidence what we term the corpus delicti. That would apply to any one in the world. In other words, he must prove that there is a dead body and that Rosen was a live man. So that that does not apply to my defendant Capone at all. It applies to Bernstein even who admits that he was one of the killers of Mr. Rosen. The District Attorney must then prove to you the killing itself. Well, you have that from the mouth of Bernstein, whom I am going to talk about in a few minutes, so that only unless you believe Bernstein's testimony and only unless you believe the alleged corroboration

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which I will also come to, would that affect my client. To make myself clear, when I made mention of the fact that less than forty pages applied to my client, I meant in which his name was directly mentioned in connection with anything arising out of this case, as I will demonstrate before I am finished.

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Let us briefly review the witnesses. There were 36 witnesses called by the People. I am going to lessen his necessity for summing up by telling you some of the things he will tell you and so he will be able to take less time. Mrs. Rosen testified to nothing concerning Capone. She does not even know Capone. Harry Regenberg is the man who conducted the candy store and heard the shooting and looked into the candy store and saw a dead man. He does not know my client. Louis Stamler is the tailor who looked from across the street in the window and saw the dead body on the floor across the street. He does not know my client. Patrolman Capadora is the man who heard the cries of this Stamler for the police and responded. He does not know my client. Dr. Marten described the autopsy and the taking of the bullet from the body. He does not know my client. Detective Walsh is the man who responded to the scene and described what he found in the presence of the medical examiner. He does not know Capone. Detective Dumont, who was formerly in the Ballistics Bureau, received the bullets from the medical examiner and gave them to Detective Butts. He does not know my man. Detective Schaeffer is the man who received the bullets from Detective Butts and returned them to the

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medical examiner. He does not know Capone. Detective Scheisser found the abandoned automobile on September 13th at Van Sinderen Avenue and described the automobile as a two-door Chevrolet and he saw Detective King there when the pictures were being taken. He told you that this automobile was about fourteen blocks from the scene of the crime. He does not know Capone. Hirsh Merlis, the proprietor of the candy store down there at the B. M. T. station who saw four or three unknown men walk up a trestle, he does not know Capone. Captain McGowan who took pictures of the abandoned car said there were no fingerprints. He does not know Capone. Samuel Pearl, the man in the embroidery business, who, while he was out looking for a piece of real estate, found a gun which he subsequently turned over to Patrolman Nelson, he does not know Capone. Patrolman Nelson who was the man who took the gun and brought Pearl over to the station house, he does not know Capone. Detective King, the man who went to where the automobile was abandoned and was the one to whom the gun was turned over by Pearl, he does not know Capone. Sergeant Butts, the man who told you about his ballistic efforts in determining whether the bullets were fired from the gun, he does not know Capone. Max Kaufmann, the owner of the Chevrolet automobile that was parked outside of his house, that was stolen by the eminent Mr. Bernstein with the aid of the ace auto and radio crook Cohen,—whom I will come to in a few minutes also,—he does not know Capone. Detective Jarvis says that the car was stolen and reported to him by Kaufmann

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as having been stolen. He does not know Capone. Detective Ambraz who investigated the ownership of the license on the abandoned Chevrolet—same answer. Abe Waxman who was the owner of the Ford from which the license plates were stolen—does not know Capone. Harold Rosen, the son of the deceased, who testified in relation to his father's business and the identification of the body he does not know Capone. Hyman Barron, Anthony DeSario, the draftsman and the architect, they described blueprints which were put in evidence here showing the description of the store—nothing about Capone. Sylvia Greenspan, the daughter of the deceased—she did not know Capone. Edward Maguire, the labor lawyer, he never even heard of Capone. Albert Aman, Joseph Bell, Thomas Wynne, the one the supervisor for the Government, the other the Government agent who testified about the arrest of Weiss in Kansas City, and the custodian over in New York—they do not know Capone. The three rebuttal witnesses used by the District Attorney, Detectives Malone, Whalen and Federal Agent Newman, they don't know Capone.

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By now I suppose you are tired of listening to me. Who does know Capone is what you are wondering. When we narrow the evidence down, the only ones who have mentioned Capone in this case in any way whatsoever are five witnesses, one, Sol Bernstein; 2, Seymour Magoon; 3, Berger; 4, Tannenbaum, as an afterthought, and 5, Rubin as to a memory of years ago. I am going to take these five witnesses apart in discussing them because every thing I tell you gentlemen when I start to analyze the facts, I

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am going to give Mr. Turkus pages for everything I tell you and when he come back tomorrow, having had time to look up where I give you the quotations from, I want him to answer whether anything which I have said is not borne out by the evidence in this case. Never mind casting reflections against lawyers, clients or otherwise. I am going to stick to the evidence. I am not going to characterize anybody except, perchance, one or two of the witnesses but outside of that there is a lot of food for thought in respect to characterizations. I will just give you one illustration. I saw Mr. Turkus writing down when Judge Talley was summing up and saying about the Half Moon Hotel down by the seashore and the segregation of witnesses there. I anticipate what Mr. Turkus is going to say about that subject. He is going to tell you of the necessity of keeping these people together under guard so that they cannot be tampered with and so they cannot be touched. Before this case, gentlemen, that theory could not be exploded but one little thing happened in this case that explodes that whole theory and I am going to tell you what it is before I go into the direct part of my summation.

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Magoon is a witness for the People not only in this case but others, according to the testimony. Magoon is just as much essential to this prosecution in Brooklyn as the baseball players out in Heckscher Park. Mr. Barshay forgot to tell you about foul balls. I wonder when they were playing ball whether they hit any foul balls. I wonder in the court-room the same thing. But let us take the evidence to see

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whether or not some foul balls were not struck, not by the District Attorney but by the witnesses who are such good baseball players that they have twelve on a side instead of nine when they go out on their tours on Long Island. But I am diverting from the subject. Magoon is not getting sirloin steaks with waiters with the towels over their arms, and playing cards and visiting or having his wife come in at eleven o'clock in the evening, or any of the things that you heard admitted here as to the rendezvous down at the Half Moon Hotel. Oh, no, Magoon is in the regular prison and has been there for months. Well, then, ask yourselves this when he expounds that theory which he is going to give to you about segregation of witnesses, sirloin steaks—and I am interrupting myself again—he will tell you that the prisoners need exercise. I admit that. So do vicious bulldogs need exercise but they put a muzzle on them when they take them out on the street and they put a leash on them too. They do not allow them to roam out in Heckscher Park playing baseball. Again I am drawing away from my subject. The subject is that if that is a theory which is worthy of your consideration, give thought to the fact that Magoon who is a witness in this case is confined in an ordinary jail where he has been confined, eating ordinary prison food, and he is still able to be a witness for the People in the prosecution against these three defendants. So the theory now is a little bit exploded. It is a little bit more exploded, as I will show you when we come to Mr. Bernstein and the letter writing episode.

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Now then I finished the testimony of those who do not affect me, and when I say me I mean my client. Let us take the exhibits. Why, he has put a parade of exhibits in here 56 in number. He has even got a card from a chicken farm out in Kansas City. Photographs, maps of every type and description. Don't let it fool you, gentlemen. None of these exhibits are worth anything when you come to deliberate this case in the light in which the Court is going to charge you. These exhibits are only worth what they are worth to prove that a crime was committed by someone but have no corroborative value whatsoever in so far as any one of the defendants on trial is concerned. They are not the evidence which the law says is necessary to tend to connect the defendants with the crime, so that for all purposes, when you get into your jury room to deliberate, the only value that can be attached to those exhibits is two-fold, one, that you will be able to ascertain that Rosen was killed, and nobody doubts that by now; two, you will be able to judge that he was killed at a particular place, in a particular manner, and we don't dispute that. I don't dispute it on behalf of my client. But when it comes down to the crucial test as to who killed Rosen, you have a different story involved and none of these exhibits are worth that much in enabling your mind to determine whether or not any of these defendants is guilty, much less the defendant whom I represent.

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So we will pass that now and go to one other thing. I know you are anxious, as you must be, but I am going to say this at the outset, gentle-

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men, a little bit unlike Judge Talley and his fear that you may be bored. I have a man's life and liberty in my possession and that is a big responsibility and, until I feel that I have amply presented to you what I consider to be sufficient for you on your conscience to come in with a verdict that is Not Guilty, I don't intend to stop. It is not going to take me too long and I don't want to bore you but I trust, because I would like to conclude today in as brief a time as I physically can, that you will bear with me because this part of my summation is meaningless. The balance of it, as soon as I pass one or two other points, will be of grave interest to you in trying to ascertain whether the People have sustained their burden in this case.

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Well, Mr. Turkus will say to you, well, if these men did not kill Rosen, who did. If he should say that to you—you see I have to guess what he is going to say—he may fool me now, having heard me tell you the things which I have heard him say before, and not tell you them at all and then you go into the jury room and say, Mr. Rosenthal was wrong again: Turkus did not even mention a word about it—but I am not taking that chance. He may say to you, "Well, who else would have a motive?" I am not here to ascribe a motive to anybody but I could answer it just as logically as he could answer the motive which he attributed to Mr. Barshay's client, because the very secretiveness of Bernstein, Bernstein the shylock who says he did not even know the brother of Abe Reles, the shylock: Sandy Reles, the shylock: Seymour Magoon,

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the shylock; Seymour Magoon, the man who says that although he knew that Reles' brother Sandy was a shylock in East New York, would not be pinned down to the corner of Ardie's luncheonette which is right across the street from Rosen's candy store; and we had to get from Mrs. Sylvia Greenspan, a woman who should never even know of the existence of any of these men, the fact that Sandy Reles not only existed but he existed right across the street from her father's store. I don't know. Do you want to look for motive? Rosen, according to Mr. Turkus in his opening address, was starving for money. Who knows, maybe he borrowed from the shylocks. Seymour Magoon and Bernstein, the only two shylocks in the world that did not beat the people within an inch of their lives so that they even almost surprised the Judge out of the chair, so that the Judge had to make the statement, "Why anybody knows what shylocks do"— "Yes", says one, "I threaten but I don't hit. I charge somebody a little bit more"—Seymour Magoon, "Oh, I would not even threaten anybody. I don't think so much of money that I would threaten a man." That shylock, soft, smooth. I wonder if he is so soft and smooth out on the street if you met him on a dark night. But let us pass that and let us come to the facts in this case.

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So that if you are looking for motives, he is the one that must ascribe the motive. He is the one that could prove that this defendant Capone had some reason. So we will pass that ques-

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tion and we will come to the question of the evidence.

I am almost ashamed to take your time on Mr. Bernstein. I am almost ashamed to take your time. Mr. Bernstein who says, "I am a rat." I wonder if they feed him cheese down in the Half Moon Hotel. But Abe Reles is only a mouse. I wonder if there is any distinction in his mind between a mouse and a rat. A mouse a little rat maybe, or he is a grown up mouse. Is that what he meant? I do not know the distinction but those are his words, not mine, "I am a mouse, no, Abe Reles is the mouse, I am a rat." Now let us look at the rat, and before I go to that there is one other thing. You see Mr. Turkus is going to say I am a good lawyer. I will say he was on a par with Mr. Rosenthal before 1940, on this side of the fence; now he exceeds Mr. Rosenthal on the other side of the fence. I have been unfortunate. Most of the people involved in this case have their personal titles or ex titles. I am a plain ordinary lawyer, without titles; but his experience before the Bar and the causes which he espoused were just as great as the causes which he is espousing now on the other side. You see sometimes jurymen get the opinion, because of their inexperience, that a District Attorney wears a cloak of saintliness. I wish he becomes District Attorney because he is a good friend of mine outside of the courtroom; inside not so good, but outside he is a good friend, but had Judge O'Dwyer been elected Mayor and somebody came in, maybe he would be counsel with me on this side of the

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fence next year; so don't let that impress you, the entity of the District Attorney. You see what I am worried about is the false issue here being raised about the holiness of the District Attorney's office, the sanctity of it, the false issue of perjury or subornation of perjury on the part of the District Attorney, which is not an issue here at all. He has got to take what is given to him. He took it when he was on the other side of the fence and believed it and presented it honestly and fairly as we are doing and he has got to do it on the other side of the fence and nobody finds any fault with him, with his actions, or with Judge O'Dwyer who happens to also be a club member of mine and a good friend of mine; so don't let them create any false issue in this case. I am not attempting to try Judge O'Dwyer or Assistant District Attorney Turkus or anybody else. I am asking you, irrespective of the entity of the persons in the District Attorney's office, to make them satisfy you under the legal rules of evidence of the guilt of my man before you convict him.

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Now Bernstein—you see I won't be so long now because I have only got Bernstein and Magoon to talk about. As a preamble to my talk about Bernstein, it really should not be necessary to talk about Bernstein for this reason: The Judge will tell you that the uncorroborated story of Bernstein is of no value, that if you go into your jury room, even if you were to believe Bernstein—and I am laughing up my sleeve—even if you were to believe him, that you could not convict unless there was outside

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unpolluted evidence tending to connect the defendant with a crime, but the alternative of that is this, that you must seek other evidence of a dependable nature tending to connect the defendant before you can believe Bernstein. You see you have a two-fold duty. If you disbelieve Bernstein, irrespective of whether you think there is some evidence, the case falls. You must both believe Bernstein and you must believe that there is other evidence tending to connect the defendants before you can find the defendants guilty, and that is the reason why I must spend time on Bernstein, to show you that even though you were to believe that there was some outside evidence, that Bernstein is so unworthy of credence at your hands that even then you could not convict the defendant Capone.

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I usually analyze pretty thoroughly. I have divided Bernstein into a number of parts—that should have probably happened to him long ago but I am merely dividing him mentally and on paper, on his own admissions. I see Mr. Turkus writing down again. I wish I knew what he was writing because I would give you the answer.

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The Court: Please.

Mr. Rosenthal: Yes, he wrote down "it should have happened to him long ago." Well, in any event he may say, and I agree with him, that it should have happened to a lot of people long ago. Don't think that any lawyer standing up in a court, whether he be a defense lawyer or a prosecution lawyer, has any use for murderers or criminals. Don't get that idea at all. I consider my reputation as good as that of Mr. Turkus

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or anyone in this court-room at the Bar and I think that is known generally. The cause that we are espousing is a cause and that has been demonstrated to you by Mr. Barshay. As long as I fairly present to you the arguments which I conscientiously believe are applicable to the particular case, that is my duty, the same as Mr. Turkus' duty is to conscientiously present the evidence which he has at hand.

Now, let us first take the background, because when you are going to judge a witness and when you are going to judge whether you are going to believe him, you first want his background, isn't that true? I got his background—and I say this to you so as to save time—as to everything I am telling you I have a page. It will take time to repeat these pages but I will cheerfully give them to Mr. Turkus and hand them to him at the conclusion of my summation for him to verify before tomorrow morning. He stole 75 cars. In 1930 he pleaded guilty to unlawful entry although he was charged with a felony. In October, 1933, he stole a car without anyone's assistance, pleaded guilty first to a felony, was allowed to withdraw the plea, then pleaded guilty to a misdemeanor. His first theft was 1930, when he was 18 or 19 years old. His second was in 1933. Those both were before he ever heard of Capone. This is the man who said he is taking orders from somebody. When that man was 22 years of age—remember first he denied, when Judge Talley questioned him as to there being any guns in that car, but on my cross-examination I was able to prove from his own lips that he was a potential murderer before he attained his major-

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ity, that he went out with two known stickup men before he had ever met Lepke or any other person connected with this case, with the intention to kill a man in the event the man was to resist being tied up and held up. That is his word and it is in the record and we can find it on pages 748 down through to page 752, and 855 to 856 of the record. In other words, this man went out when he had just attained his majority, having done no lawful work of any character after he had lost his third job, and he did not even remember whether he was in a job when he did this, and with guns in the car, with ropes in the car, with known stickup men, went out deliberately, when he was fortunately apprehended by a policeman, to kill a man if he resisted being held up and robbed of his money. That is not all. That is not all. He helped to dispose of the body in the Yuran murder. He was a shylock, gambler, bookmaker, on his own account and then, if you remember those significant words when I asked him before he met Capone about these questions he says, and that is on page 587, "I was not an angel. Does that satisfy you!"

11166 This man that had ten, twenty customers, this man that was a small shylock, was able to borrow \$50,000 in his youth, endorsed by Meyers' signature. For what? To run his shylock business, this angel who only charged two a week instead of one a week and who never threatened, or threatened but never hurt anybody. Well, what else? Then he suffered a lapse of memory. You remember he forgot that his benefactor, his benefactor Meyers, the man who endorsed the back of his notes, stopped loaning him money. He denied that he assaulted this man's daughter

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but he did not remember whether in court, where he was brought, she did not withdraw the complaint and say that it was an accident that he assaulted her. He was a strong-arm man in a gambling place. He threatened people who owed him money and, now here is the significant thing, this man who was utilized as a People's witness, up in the mountains in Monticello, admitted way back, way back, he was asked by this man Strauss to take a gun and go out and kill Cohen in California. Of course he did not kill him but he did go to California. Use your common sense. And then to justify his going to California, he said he even got Cohen the job in the movies. Do you remember that? Well, then, whom did he go to California with? Well, he fumed and he fretted and he did not know about Hershel Bernstein until the Judge said to him, "Why, wasn't Hershel Bernstein a notorious burglar and crook?" and then for the first time he remembered that his companion on the way out to California was the burglar and crook, Hershel Bernstein.

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Well, believe him or not, he followed carnivals all over the country—no, excuse me, only as far as Maryland; he did not go all over the country. On all of his trips to California and all over the country he did not burglarize and steal. He was merely a "schil" for a carnival. That is his story, and this saintly creature then buys himself a candy store which he runs as a blind for his crooked and for his loan shark business. I am only repeating that to show you, when the District Attorney tells you about his taking orders, this is the man who takes orders. You can

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imagine him taking orders. And then he drove Fat Kupperman, his friend, to a doorway—of course he did not put him on the spot, oh, no, but he says he did not meet Fat Kupperman by accident that night, oh, no, but Fat Kupperman, his friend, did not live any more after he delivered him at the doorway of his home.

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Now, why go further? There are other things he did. But now let us analyze it further. That is his background. Who is this man who sits before you? Well, you have a right to say, in view of all these things that are known, is he in jail, instead of in the Half Moon eating steaks and chops, charged with something? Oh, no. No charges of any kind are pending against that man up to the minute that he left the stand. In other words, he got immunity before the Grand Jury in the Yuran case. You understand what immunity is. It means that he can never be prosecuted for the crime, so he is out of that, isn't he? He testified before the Grand Jury in this case. He got immunity in this case before the Grand Jury, so he can never be prosecuted for that.

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And his answer, on pages 962, 3 and 4, when he was asked by me the question as to whether there were any charges pending against him, was the words, now no charges pending against him of any kind, of any kind. As far as this man is concerned, as far as you are concerned, he is merely in protective custody so that right now, close to Christmas of 1941—what a Christmas present he is getting, what a motive for a man to go on the stand and lie, but I will show you that that motive is mild to what else there is in this case in so far as Bernstein is concerned.

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Remember a man was being tried for his life Monticello. A man was on trial for his life just as my client is on trial for his life now. Twelve men were put in a box. I do not know whether they had alternates or not in that trial.

The Court: You may not discuss it.

Mr. Rosenthal: I respectfully except, sir. I am not discussing anything.

The Court: If there is anything further said, I will excuse the jury.

Mr. Rosenthal: I respectfully except, sir. This man, as I will show you from the evidence of his contradictions between his mountain testimony as borne out by the evidence in this trial, swore in a trial in Monticello before the ever living God that he would tell the truth, the whole truth and nothing but the truth. This man on this trial, as I will show from a quotation from the evidence, told you that he deliberately lied before the jury in Monticello in a court of similar jurisdiction. Let me get to his contradictions between his mountain testimony and here. I intended to go into the contradictions which comprise all of these pages but I will run them through fast so that I do not take too much time. This is his testimony on page 778 of this record:

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"Q. You were under oath in the Gangi trial, weren't you? A. Yes, sir. Q. Swore the same way as you did in this court-room, didn't you? A. Yes, sir. Q. To tell the truth? A. Yes, sir.

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Q. A man's life was at stake, wasn't it? A. Yes, sir.

Q. And you had a jury similar to this, sitting there listening to your story? A. Yes, sir. Q. And in the court you told the jury, I am telling you the truth? A. About the case."

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At page 866: "Q. Now, then, do you recall now at this time whether or not you were not directly asked the question in the mountains, in the Gangi Cohen trial: 'Q. You want to make sure every word you say is heard? A. I am telling the truth. Q. You were coached to answer? A. Telling the truth.' Have you any recollection of whether or not you did not make, in form or substance, that statement in the presence of the Court and the jury in the Gangi Cohen trial? A. About Gangi, yes, sir.

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"Mr. Rosenthal: I move to strike out the answer as not responsive.

"By the Court:

"Q. Do you remember those questions and answers, yes or no? A. If it is in the book."

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If it is in the book. And so I say to you, as appears in this record, he admits to you that before a jury similar to you, in the mountains, he deliberately faced them and swore that he was telling the truth. He lied. Oh, they are going to tell you some of the men were on the lam. Why, that man deliberately tried to put the issue on to Mr. Turkus' shoulder or the District Attorney of the Catskill Mountains because he says, "I was told by some one in the District Attorney's office." Oh, the Judge rightfully said to me at that time, "You don't want to make an issue between the District Attorney". No, I don't. That man is a deliberate unqualified liar and would lie to anything to save himself. I know that Mr. Turkus or Mr. O'Dwyer or any District Attorney would not tell that man to con-

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conceal the truth where a man's life was at stake. Now, let us take for instance, his statement that he was told to conceal because men were on the lam. Try to believe that. Conceal what? Conceal what? Conceal that he knew about this case. I will show you that that is even a falsity because in the mountain testimony he swore he never used an alias. Whom would that affect? Would that affect the Rosen case? That would affect his credibility. Here he admits that he did. In the mountain case he said he was not a thief. Did not the jury in the mountains have a right to know whether they were talking to the man who had stolen 75 cars? Who was that protecting? Who was that protecting? Bernstein. In the mountains he swore he never committed a murder in his life or never saw one. Did that affect the men that were on the lam? Whom did that affect? Did the jury in the mountains have a right to know that they had a murderer on the stand, a thief on the stand, and thereby be able to weigh his testimony so as to be able to determine for themselves whether he was telling the truth? So we will pass that by. There are a number of other things. When he tells you that he lied under oath in the mountains to conceal outside persons, he lied there; he lied here, and he will lie hereafter. Because the things that he lied about, which I will show you from the record, only affected himself and no other persons.

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Let us briefly then go to his contradictions because I have got them analyzed here, gentlemen, his contradictions between here and the mountains, his contradictions between here and the

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testimony before the Grand Jury in this trial, his contradictions between his direct examination and his cross-examination. I have got them all analyzed. I am only going to briefly annotate them because it will take too long to give you the illustrations, although I have got them word for word here. Now let us go ahead. In the mountains—oh, that will ring in my ears after this case is over—if it is in the book, I said it—if it is in the book I said it. Whoever told you to say that? Nobody. Well, how did you know that it was in the book? Who would know it was in the book? Well, you are reading from something. Anyhow that is the reason. Cagey, cagey. If it is in the book, I said it. So, as I go into these contradictions, you will find this, never would he say, yes, I said this in the mountains. If it is in the book I said it. Then I would have to turn to Mr. Turkus: "Is it in the book?" "Yes, it is in the book." "Here, mister, it is in the book". "Well, if it is in the book, I said it." So, let us go to the "If it is in the book, I said it".

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In the mountains he swore he never had a bank account, never had a bank account. "Did you keep a bank account? (on page 15)? A. No, sir. Q. Never? A. No, sir."

Lo and behold, what do we prove on this trial?

"Did you have a bank account? A. Yes, sir. Q. Where? A. Manufacturers Trust Company."

I have to read this one. This is a good one.

"Did you think of that expression 'If it is in the book, I said it'"—this is on page 779 and 780: "Nobody told me anything.

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Q. You thought of that yourself, did you? A. What do you mean, I thought of it myself?

Q. Did you think of that expression 'If it is in the book, I said it' by yourself or were you told by somebody to say 'If it is in the book, I said it'? A. Nobody told me anything.

Q. So you thought of it yourself, did you? Did you think of it yourself? A. I myself, sir.

"Q. How did you know there was a book? A. You are reading a book, aren't you, sir?

"Q. So that you thought of it when you got on the stand, is that it? A. You are reading a book."

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Now, let us just take that for a minute. Whom was he hiding? Who was on the lam, so-called, or on the run, that would have been affected by his telling the jury in the mountains that he was a loan shark, borrowing \$50,000, and had a bank account? Anybody? No. He is an innate, in-born liar and he could not tell the truth. Let us take the next.

In the mountains—I am going to run through them quickly without quotation but I am going to give the pages so Mr. Turkus can verify. 775 to 777, in the mountains, he swore, never threatened anybody in his life in the shylock business. What? Did not threaten anybody? Here, well, he admits that he threatened them, after the Judge had asked questions about the methods of shylocking, but he never hit them. Whom was he hiding in the mountains when he said he did not threaten?

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As to his alias, page 779, he was asked in the mountains whether he ever used any other name. No.

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"Q. When you say you did not want to give out any information, do you mean information about yourself and the aliases that you had used? Is that what you mean? A. Yes, sir:" Was not the jury entitled to know that in the mountains? Was he hiding something because somebody was on the lam?

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Now, about his employment. He even contradicted himself about the employment, and now here is the significant thing; here is the significant thing. In the mountains he said he did not know Bugsy Goldstein. In the mountains he did not know Bugsy Goldstein. In this trial he did know Bugsy Goldstein. That is page 832. In the mountains he knew Reles very well; Abie Reles he knew him very well. Here his answer is that he did not know him so well but if it is in the book, it is in the book, and if it is in the book, it is so.

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Page 841, 842. In the mountains he swore that he was a reformed thief, that he had only stolen one car in his life. Here he swore he stole 75 cars, mind you, gentlemen, up to 1940, up to the date almost that he was testifying in the mountains, and there he had he had not stolen a car since 1930. Was the jury entitled to know that? Was he hiding somebody that was on the lam or was he putting himself in a false light?

In the mountains, in regard to guns—and now this is a very important thing—you see it takes a little longer than I thought—this is very important and I want you to listen carefully because the Judge will charge you on reasonable doubt. Reasonable doubt arises not

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only from the evidence itself but from the lack of evidence. You know in this trial he told you about these guns that were handed out on the corner. You remember that, don't you? He not only told you about the guns that were handed out on the corner; he told you about the guns that were used in the stickup when he was almost a boy. He told you about the gun that was shown to him by Harry Strauss when he wanted to go out and kill Gangi Cohen, the very man whose life—maybe he did not have the courage to put the gun up against him but he had the courage to testify against him. In the mountains this man testified—and this I am going to read:

11192

“Q. You know what muscles are? A. Yes, sir.

“Q. You know what guns are? A. Yes, sir.

“Q. Have you seen a gun many times? A. No, sir.

“You have never in your life seen a gun? A. Yes.

“Q. Why did you say at first ‘No, sir’? A. I just reminded myself.

11193

“Q. How many times did you see a gun? A. Once.

Q. What year was it? A. I don't know what year it was. I seen it.’ ”

“Were you asked those questions in the mountains and did you give those answers? A. I can explain about that.

“Q. That was not true that you had only seen a gun once in your life when you told that to the jury in the Gangi Cohen trial? A. No, sir.”

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Now, let us analyze that. If a man would have the temerity to take the witness-stand, whether it be in this court or any other court, and swear before a jury that he had only seen a gun once in his life and then when it was shown to him in 1937 by Harry Strauss, what assurance have you got that when he now says that he has seen them many times and when it has been brought out from the evidence that he not only saw them but was willing to use them when he was almost an infant in arms, what assurance have you got upon which you can rely on a man's testimony of that character?

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I have only skimmed the surface. Why, there are reams and reams of his contradictions and I am only going to pass them as quickly as I can so as not to bore or tire you because I think, even by now, it is clear that that man's story is unworthy of belief in any court-room.

Oh, he admitted that in the Cohen trial. He said he had taken five or six trips with loan shark money for his vacations. Here the story changes. He trips to California and it was not with loan shark money but if it is in the book, it is in the book. He admitted to Judge Talley that he used the name of Jackie Berman in Miami. And admitted that that was not true.

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Here is another very important thing, another very important thing. Why, in the mountains, in the mountains, this man had the temerity to tell a jury that he did not know Tannenbaum, that is, that he did not have any business with Tannenbaum. Can you imagine that? Can you imagine that, when the man has the temerity to come here and admit that he not only went out

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on jobs with him but that he did everything but commit murder with him, the Yuran, the carrying the body, and so forth? Can you imagine him telling a jury that he never had any business with Tannenbaum, under oath; the same oath as he takes in this court he took in that court. Need I go further? Oh, but I will. Those are only mild. They are only mild compared to some of the things. Why, he said here he did not point out to the police anything about where the pick or the axe were buried, not he, not Bernstein; but he forgot that under oath in the mountains, under oath in the mountains, was the very statement of his that he did point them out. Another little bit. You think that that is bad. You think that is bad. I think I should stop going through this record when I take the next one, because the next one is applicable to this case and this case alone. When asked in the mountains whether he ever was connected with any murder, including Rosen, he definitely said no. No. Why, can you imagine this Judge here is going to charge you as a matter of law that this man is a murderer in this case, that this man is an accomplice, admitted, by law. Up in the mountains, why, he never saw a murder committed, not the innocent Mr. Bernstein.

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Should I waste your time and go through these contradictions? Should I go through the contradictions between his testimony now and as it appeared in the Graund Jury? Should I go through the contradictions between the testimony on his direct and cross-examination? What more need you have in front of you? What more need you have than the deliberate, downright perjury

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committed by this man? I think it would be an insult to your intelligence. I really do. And even though I have spent nights and days getting up these contradictions of a material nature, I think I should pass on. I really think that I should take the brunt of this situation.

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Now I am going to give you two or three more and I am going to throw all of this away. I am going to give you two or three more, if you need more. This man deliberately said on this stand about "Muggsy" Cohen. Now, remember that "Muggsy" Cohen was in the District Attorney's office, according to "Muggsy" Cohen, in April of 1941. If this car was stolen in September of 1936, I am going to ask the Court to charge you that the Statute of Limitations regarding the arrest of the individual does not expire until five years pass, so it was within the time of the Statute of Limitations. If the District Attorney believed Bernstein, that "Muggsy" Cohen was out on that job with him, and if "Muggsy" Cohen when he was in the District Attorney's office in April and was let go, admitted that Bernstein was telling the truth, then "Muggsy" Cohen

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would be behind bars now, charged with the theft of that automobile. But that unmitigated liar had the temerity, even here, to tell you that he has never seen Cohen since 1940, when he took a trip to Florida; he has never seen Cohen; where Cohen takes the stand and says that in the District Attorney's office he was confronted with him. Now, say you to yourself, "What significance did that have?" Oh, it has got great significance, and I will give you the page if there is any question about it, Mr. Turkus. Cohen,

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when he was called on the stand by Judge Talley, testified that in 1941, in the presence of Mr. Turkus, in the District Attorney's office, he confronted Bernstein. That is his testimony. If there is any question, I will take it from the record. And Cohen was let go and Cohen was not used as a witness to verify. Why? Is there a doubt in your mind as to whether he would say that he was with this man? Well, if he was not with him, then Bernstein is a liar.

To add everything up,—and to do what I said I would do with all of these records, because I had no idea it would consume the length of time that it has, and I see then the necessity for shortening,—the thing that stands out in this trial is this. This man, in the safety of the Half Moon Hotel never thought, never thought that his acts would ever be discovered. The theory of the prosecution—oh, how he said in his opening and how he described it when the witness took the stand: bars on the windows, bars on the doors, shot guns around, policemen sleeping here, mirrors in the hallway, mirrors here, guns out, a regular Wild West proposition to guard these witnesses; men sitting at the bedside when they are asleep, that is the testimony, sitting up all night alongside of the bed of Mr. Bernstein, so he could not talk. That is the testimony. Why, they even sat up all night watching this poor, innocent man sleep. How his conscience let him sleep, I don't know, but that is none of my affair. In any event, with the thought of the power of the State behind him, he goes on this stand, and little did he know that he would be exposed; he was tied down by me as to whether

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he ever wrote a letter, whether his wife ever took one, whether he ever had a stamp, whether he had an envelope, whether it was ever secretly taken out, whether a policeman was always at his side. I had the mountain testimony to know what a crawler he was, and I was not going to let him crawl. I gave him every opportunity in the world to crawl from under, and you can have the testimony read if there is any doubt in your mind, because this has been a long trial. Oh, did I give him time to crawl from under: "Did your wife ever write or did you ever secretly get it out? Did a policeman ever see you? Did you ever use a stamp?" And I tied him and I tied him and I tied him and I let him go. And he thought he got away with it. He thought he got away with something. Because little did he imagine that there was anybody in the world that could find out that he had the power to send out letters, send out letters. Now, if he would have told you yes, he sent letters, you could not have found any fault with that, because even if he was in protective custody, there would be no harm sending a legitimate letter to a nice character, to the ordinary individual. Unfortunately, and that is a rule of law which the Court applied, to which I excepted, the contents of the letter is none of your concern at this time. However, the fact remains that he deliberately told you this. Let me wind up with it. If this has not convinced you—and I have, as I say, a hundred more even more important contradictions, if there could be such, because there is a great deal of significance to this—you may not see the significance—the

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District Attorney says police watching him, they cannot even talk. They sit down to eat. I suppose the detective sits in between them so that they cannot look at one another. You see, that negatives the opportunity to concoct. You see, if I cannot talk to you and if he is always around, we could not concoct a story together, could we, so we have got to have detectives with bars, shotguns, sleeping in the room, standing up while we are asleep, and everything else. But the bottom falls out. The bottom falls out because that shows an opportunity to concoct, the ability to write the type of letters which he wrote and the things which he said and the things which he secreted, so you do away with that theory they could not concoct a story between themselves; and what would there be to prevent their being separated from one another? Anything? But they are all together, playing cards.

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Now, finally—I am quoting from page 1071 of the record, 1084 of the record, 598 of the record, and 682—and in this regard, when counsel was cross-examining Mr. Bernstein, this is the remark which the Court passed: “The rest of the letter must be submitted before the Court can pass on it. He has admitted now that he lied. You do not have to establish that:” (at 1071) “It is established that the witness testified under previous cross that he did not send out a letter, and now he admits that he did.”

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“Mr. Talley: Your Honor has stated from the bench that this witness has testified falsely with regard to sending the letter.

“The Court: Yes.

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"Mr. Talley: Your Honor stated—I think the language was—that he had lied before this jury.

"The Court: Yes. That is obvious."

At 598:

"By the Court:

"Q. Did you testify in the trial of Gangi Cohen to anything that was not true? A. Yes, sir." • • •

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"Q. Did you fail to testify to some things that were true? A. Yes, sir."

Page 682—well, that is only repetition.

So, to sum it all up before I go to his story, to sum it all up, he not only admits he lies, the records not only show he lies, but you have even the statement of the Court that he has lied.

Well, as Mr. Turkus started to say when we started this case, "What has that got to do with the Rosen killing?" Now we will come to his testimony in so far as it affects my client. I have subdivided that, gentlemen—and this, of course, is of importance:

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The first meeting, not that we admit it, but the first alleged meeting between Bernstein and my client was, according to him, in the year 1932 or 1933, when he says that he met my client at the Coffee Pot and was introduced by Mike Sycoff. You see, I am going to analyze each thing from now on of what was said in this case about my client. You remember—maybe you forgot—Mike Sycoff is one of the baseball players. He is down in the Half Moon Hotel. He has been down there eighteen months. He is still down there. I do not know, like the others, whether he has any charge against him.

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but he is one of the team that was down at Heckscher Park and he is one of the bosom companions of Bernstein. Say to yourselves, "Why wasn't Sycoff called to verify this proposition?" They put in photographs that are meaningless, smile as much as you will; they put in photographs that have no meaning in the ordinary case. All they would have to do is say, "A car was stolen." They do not need license plates and this and that, and men to hand the bullets back again, the photograph of the sidewalk, the grass that was on it. Why, then, if they are so particular, don't they bring Mike Sycoff to show that he introduced—because I assume the purpose of that is to try to show association of my client with somebody. Now, assuming that you believe him, because he says that my man—I am going to show you how ridiculous it is—was one of the crowd, but isn't it a funny thing that he became a gambler and a shylock in 1930? He says in 1930 he borrowed money (at page 485) while he was working, and he became a gambler and a shylock and a convicted thief three years before he ever saw my man, if he ever saw my man in his life. Now, just let us compare, because we have got to compare. When I make reference to any of these witnesses that may affect any of the other defendants, it is with no desire in any wise to say that I believe their testimony, but only for the purpose of comparison. Tannenbaum was supposed to be a man who had access to Buchalter's office five times a week and was on his payroll, according to him, for many years, ten, eleven, since 1931. Tannenbaum was brought up in Brownsville,

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and Tannenbaum is supposed to be one of the mob. Now, if what Bernstein says is true, how under the sun is it that Tannenbaum says that he never met Capone until the year 1938, two years after this crime? Two years after. The first time Tannenbaum ever saw Capone in his life was in 1938. Tannenbaum, the six-time murderer, Tannenbaum, the alleged member of the Combination; Tannenbaum, the man who hangs out on the street corner; Tannenbaum, who was always present in Mr. Buchalter's office; he never saw Capone until 1938, never saw him in his life. Well, whom do you believe? I am not believing either, but I say that there explodes the theory of Capone, but they have got to put him in some way.

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Let us go to the next point in the case. Oh, it is very funny; there are so many of these things that it is impossible to analyze all of them. I just want to take the highlights. What took me nights and nights of ferreting to get out of the record so as to be sure that what I say is founded on fact, I don't want to burden you with by taking the same amount of time. If there is any doubt of the testimony, on 2425 and 2426 of the record it appears that Tannenbaum met Capone for the first time in 1938. He frequented this neighborhood continuously from the year 1933 and, according to the witness Magoon, was a member of the Combination. Now, isn't that peculiar? If my client had anything to do—and I don't admit there is a Combination—but if he had anything to do, as this liar Bernstein would have you believe, with this alleged Combination, why didn't Tannenbaum know?

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Does that create a doubt? Let me pass that, even though I have a number of other things on the same subject. I will tell you why: Atmosphere. Atmosphere. Not facts—atmosphere.

Let us go to the next thing: Bernstein says that he met the defendant Capone on September 11th at Sackman and Livonia, between twelve and one o'clock. I am taking this from the record. He said that while he was waiting for Mike Sycoff—all of these meetings, by the way, are accidental; I never saw so many accidents in my life as I did in this case—he was waiting for Mike Sycoff to come along. He never came along.

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Around one o'clock, accidentally, Harry Strauss came along, accidentally got in the car in order to have a general conversation, when accidentally along came Capone and the other men and accidentally they left, and accidentally they came back, and then he got his orders. That is his testimony. Let us analyze it for a minute. This testimony is palpably false, because you have got to weigh one with the other. He says that at one o'clock in the afternoon of Friday—and I am not going to give you his contradictions about his changing it, went from four back to one to seven o'clock and all that—that is all in the record, and I have discarded that already; I don't want to go back and bore you by giving you all those talks, but listen to this: According to the others, Tannenbaum, Berger, and Rubin, the plan to kill Rosen was only perfected at five o'clock at night, and the alleged meeting with Capone—and I am coming to that—took place around nine-thirty at Sackman and Livonia. I will come to that when I come to Berger's story. Well, which

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is true? If the plan to kill did not start until five, six, seven hours after the alleged meeting, how could the alleged meeting discuss the plan to kill? If, as the witness said, he tried to plead that the defendant Buchalter give him another chance and went over to Weinstein, and came back, and Rubin and Berger and all of that happened, how is it, then, at 12:45 in the afternoon, before the murder was even conceived of, this alleged meeting happened? Does that raise a doubt as to whether it actually happened? Well,

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you can have the testimony read. Berger did not leave New York, according to him, until five o'clock. It was not decided that they were going to go ahead and finger this man until that time. He did not go over from New York, where he was supposed to be taken in a taxicab by Lepke to meet Weiss in New York, and leave and come over until nine-thirty, when the finger was supposed to have been placed on this man Rosen, and it was only accidentally—another accident—and I will come to that when I come to his testimony—that they saw Capone alone on the street, but he heard no conversation, but he said "Hello" to him. That is inference. Association.

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You are supposed to convict a man of murder in the first degree on an inference of that character. But we will come to that. However, is there a doubt created in your mind as to the truth of the statement, if you need any more about the truth of the statement of Bernstein, when I say to you that this alleged meeting in which was discussed the question of the killing, the stealing of the car, took place five hours before it was even thought of that they were going to kill him?

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Now let us go to the next point: Well, the next point is the question of his attempt to get the drop and his effort to steal the car. Well, poor "Muggsy" Cohen. Or should I say lucky "Muggsy" Cohen? You know, when I say "atmosphere," I say it advisedly. If "Muggsy" Cohen, when first confronted with Bernstein after this indictment, or prior to this indictment, in any wise verified the story, then he should have been one of the baseball players along with the rest of them, with Mike Sycoff, Allie Tannenbaum, and the rest of that team. But no, he walked out of the District Attorney's office, and the only time that you see him is when I brought out from Bernstein on cross-examination about Cohen, out go the detectives, in comes Cohen. To testify? N-n-n-n-n. Just like the handcuffs and other things. You have to have effect. So he stands back heré. "Bernstein, who is that man standing in the court-room?" "'Muggsy' Cohen." "Right." Cohen, out. What is that for? What is that for? You see, if Cohen was not put on the stand by Judge Talley, you would think that Cohen was in custody, wouldn't you? And you would have a right to think it, and you would say to yourself, "That substantiates Mr. Bernstein," wouldn't you, and you would have a right to say it. So you don't know that Cohen was just grabbed off the street and put in the Hotel Bossert, smoking big cigars, and steaks also. You don't know that. Oh, no. And I would like to lay a bet he is not there now. You don't know that, and you would never know it, because they did not think counsel for the defendant, Judge Talley, would have the temerity

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to call a man who was in the custody of the District Attorney, but he did, and you found out that Cohen is under no charge, that Cohen was only picked up after Bernstein testified, although he had been picked up a year ago and let go. Figure that out, whether there is a doubt created by that.

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Now let us pass on, with his drop. Oh, wait. This man testified in the Grand Jury that Cohen went back with him the next morning. I did not read that to you. Here he said Cohen was only with him the night. He did not want to get poor Mr. Cohen in trouble, so he took the radio back to him. Stole seventy-four cars alone, some of which were used in murders, and he knows this one was going to be used in a "schlomming" job, so he went to "Muggsy" to get the radio. I am wasting time on that. However, we will get to the next proposition.

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When is he supposed to see Capone? Now, he is supposed to see Capone the next day. Here is the first time for Capone in the case, on September 11th. At 4 p. m. he is supposed to see Capone. Let me tell you this, gentlemen, and this is important: In the Grand Jury he said it was 7 p. m. Once it is light, the other time it is dark. The Grand Jury—don't confuse yourself—was no more than a year ago, so his memory now is no better than then, but when you manufacture a story you get a little bit mixed up sometimes, and hours do not make so much difference. This, to me, is the most laughable thing of anything. Remember, he never gives Capone a conversation at all. Weiss orders him to do this; Strauss orders him to do that, but in this

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trial, because the District Attorney in his opening told you Strauss is dead, so we have to have a live substitute for a dead man, and it appears that he said in the Grand Jury these different things took place through Strauss, he just changes the name. What is in a name for Mr. Jackie Berman of Miami, who forgot he used the alias when he was testifying in Monticello? So he changes it from Strauss, who is dead, and he put in Capone, who is alive. That is taken from the Grand Jury. Oh, how you could send anybody even to jail on a disdemeanor charge on testimony of that character is more than I can say. But the most ridiculous thing of all—and I am not going to take time doing it because it will take too long—is this man, born and brought up in Brownsville, who on his examination tells you that he knows every street there by heart, he has got to rope him in, so Capone took him eight times over the route. You take the map in the jury room. I don't want to waste time. The route consists of about this, that is about all, about one or two turns, that is all the route consists of, so he had to take a man who knew Pennsylvania Avenue and Blake Avenue and Van Sinderen Avenue, and he took him eight times, back and forth, back and forth, back and forth, and then he gives the conversation.

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"There is a man going to be killed." You know what the purpose of that is? That is the purpose to show that Capone was in on the murder.

Let us pass that; let us pass that. The most significant thing of all is the alleged next meet-

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ing. I am not going to waste time. In the Grand Jury he said Strauss told him to steal the plates. In the Grand Jury he said he drove the car, he, Bernstein, drove the car over the route. Here he says Capone drove the car and "I sat alongside of him." You cannot make those kind of mistakes. — Either you drove it or he drove it. If you drove it over the route, he would have to tell you the streets; if he drove it over the route, you would just watch the route, but that was not a good enough story that he told to the Grand Jury, because if he, Bernstein, drove the car, Capone would have to say, "Turn here, turn there," so he has got to put Capone at the wheel. "Capone always has my car, so Capone sat at the wheel," but either he lied to the Grand Jury of this county or he lied to you, and you can take your choice, whichever one you want.

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Now let us go to the next proposition. What I am trying to figure out is this: You know in his examination how mysteriously Capone disappears from the picture when he forgets about it, is more than I can conceive of. You know when he came to going to the park, "Where is Capone?" Oh, Mr. Turkus had to direct his attention. "Wasn't he there?" "Yes, he had my car, so he must have been there," was his original answer, but here is the point: There is no Capone any place. They go to the park. There are supposed to be guns distributed. Capone is not there. That is his story. They look over the place and he stays in the park. Capone is not there. They then arrange to delay it until the next morning, and Capone is not there. And

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what am I asking myself is this: There is one little loophole in this man's whole story about Capone, "How did Capone know to be on Junius Street on Sunday morning at six o'clock?" Figure that one out. How did he know to be on Junius Street at any time? There is nothing in this conversation or alleged conversation that Capone said, "I will be waiting with a car," in fact, the testimony is that when they left the park he went over and delivered the car and when he came back everybody was in Cohen's house. That is his testimony. There is no question that anybody went to Junius Street and said, "Here, don't wait here any longer. We are going to do it on Sunday." There is no testimony that anybody left the house all night, in fact, he says he did not sleep all night, in fact, they gave him a sandwich and they left, and so how in the world did Capone know to be at Junius Street on Sunday after the alleged killing? Well, Mr. Turkus, the only answer I can see to that is, "How do we know that somebody unbeknown to Bernstein did not go over and tell him? How do we know that Capone did not have a telephone? How do we know this? How do we know that?" But I say to you that I am going to ask the Court to charge you that you cannot speculate a man's life away. You are bound by the evidence in this case, and there is nothing in this case that at any time Capone agreed to wait on Junius Street, and there is nothing in this case to show that Capone at any time knew that they would be on Junius Street on the following morning, assuming that the killing is true.

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Well, the District Attorney says he has a system. "We have a system," says he. You know, gentlemen, if a man signs a written statement, if a man is questioned and he gives answers, under our law as it now exists, we have a right to demand that that statement be handed to the Court to see if any inconsistencies exist, and if so, it is the duty of the Court to hand so much of the inconsistencies to counsel as he, the Court, sees fit. You saw that happen when I got the Grand Jury minutes of Bernstein. What is this system of the District Attorney's office? What is this system that takes no statement from murderers—confessed murderers? What is this system that does not take down in question-and-answer form from confessed murderers, so that counsel may be able to confront them with their original story; but they stayed eighteen months together, eating, sleeping, playing baseball, and concocting; and what is in this system that makes the District Attorney take affidavits, sworn ones, from persons who are not confessed murderers? Oh, he took a sworn statement from Sobler. Did that violate his system? He was tickled to death to bring that out when Mr. Sobler took the stand. He took a sworn affidavit, if not two of them, from "Muggsy" Cohen. He showed it to you. He asked "Muggsy" Cohen about it. Was the system violated then? Oh, no, nothing from Bernstein, nothing from Tannenbaum, nothing from Magoon. N-n-n-n-n-n-n. No statements, no signing, no questions, no answers, only from men who might be telling the truth and who made affidavit and who are not being confined down

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in the Half Moon Hotel, eating steaks, Mr. Cohen and the rest. What is this system? I don't understand it. I don't understand it.

Well, I think I have pretty well covered Bernstein. I could have covered him much better. Oh, even remember the race track. You know, I knew what I had in mind. I made a statement to you as to what I intended to do when I opened this case, I mean in the formal questioning. My opinion changed subsequently and I take the responsibility that the defendant has offered no evidence, the defendant Capone. Judge will charge you that that cannot be used at all. Counsel is responsible for that. I accepted that responsibility, and I still accept it. But when, at the outset of this case, Bernstein took the stand, I asked him about whether he had ever been to the race track in Queens. What is so hard about a question, "Were you ever to the race track?" "What do you mean?" The Judge said, "You have to make your question more specific." So as soon as I said, "Were you ever to the race track when Louis Capone—" "Oh, sure I was. Sure I was to the Queens race track plenty of times with Louis Capone." What is another little lie for him? This man's testimony so reeks with perjury that I cannot see, even if there were outside evidence, how you gentlemen could in any wise give him any credence whatsoever.

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Well, we will pass to the next man. I think the Judge is going to charge you in this case—of course, you are going to be bound by his charge—that the only evidence tending to connect the defendant Capone with this trial is the

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evidence of Seymour Magoon. I think you are going to get that charge. In other words, as far as your verdict is concerned, the liberty of Louis Capone is going to rest on that hair-line alleged conversation. I am coming to that Seymour Magoon. So it becomes my duty to talk to you about Magoon. As I said, I could talk for hours more about this man Bernstein and tell you contradictions. I would tire you, I would tire myself, and I don't think I would accomplish any more than I have accomplished by showing you these contradictions.

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Now let us take a peek at the next character and the only character who affects us, so that you won't be bored. He is not going to take as long as the other fellow. Seymour Magoon. Well, he started off life pretty nice. "I want to be truthful with you, Counsellor, I never was interested in work or school." Why, he started when he was in public school. He says he knows the defendant Capone for seven or eight years, but he was in public school twice that long, if not more. He started when he was in public school. He did not need any tutors. It is remarkable how these men all of a sudden take orders, take orders, these mild mannered men who are led astray by some great criminal who gave them orders. Mr. Bernstein, the guy who takes a gun when he is twenty years of age and wants to kill a man without orders. How unfortunate is their life, that they were misled by others. He started when he was thirteen years of age. He does not even know when. He even lied when he testified to you when he left school. One time he said sixteen, another fourteen. He

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did not even know the difference between sixteen and fourteen. Well, in 1928, that is thirteen years ago, years and years before he ever heard of Capone, at 1:30 in the morning, he committed a robbery on William J. Kennedy, a poor bricklayer whom he had never seen before, and with a fellow named White, and he stole the automobile, made him drive him some place, beat him up, robbed him,—force and armed—when a kid, before he ever heard of any of these defendants. That is the start of his background. He, take orders? That man who admits that in addition to that he has never served a day in his life, that he waived immunity on that charge and had it dismissed against him? I wonder did he tell the Grand Jury in that case a little white lie, the man that never told a lie, only little white lies? Can you remember my asking him, “Did you falsify? Did you testify fasely before that Grand Jury in 1928?” Remember he got out of that? He now admits that he stuck up William Kennedy, this bricklayer, at 1:30 in the morning. He admits that now. You know why he admits it now? Five years have passed. He cannot be prosecuted. He admits that now. But what did he tell the Grand Jury that led them to let him go? He does not remember, says he, whether he testified falsely then. He started pretty early, but he said, “Counsellor, I told little white lies.” He did not even tell big ones, only little white lies. Do you remember his expression?

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Again, he took the employees of Max Udell & Son. This was in 1930, before he ever heard of this defendant, according to him. You remern-

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bered they robbed the goods from the concern and everything and, lo and behold, he had a good detour during the few minutes that he might have seen my friend, the illustrious Mr. Bernstein. Here is his answer to that: "If you say so, Counsellor." You remember that is when I told the Court he was getting too nice to me and I said, "We'd better adjourn for the day." I asked him, "Isn't it a fact that you threatened these people, these Udell people?" "If you say so, Counsellor, it must be so." That is when I said, "Don't say if I say so." "He is getting too affable. Let us take an adjournment." He was starting to agree with me.

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He was a shylock for years, roughly. He was in business with this fellow Burns. He was familiar with the vicinity. He had a fight with a patrolman by the name of Murphy. He knocked him unconscious. He rented a garage—there is another one—this is very important in this case. Mr. Bernstein told you—I do not know why I passed it, because this is applicable to this case—

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Mr. Bernstein told you in this case that the guns he thinks were delivered by Joe Pileh and he thinks Joe Pileh delivered the guns, and on cross-examination I brought out that he told the Grand Jury that it was Joe Pileh delivered the guns and on cross-examination I brought out that he knew Joe Pileh for years and there was no question. If Joe Pileh is in custody, why wasn't he brought to substantiate Mr. Bernstein about the delivery of the guns? I will tell you why: Because Mr. Bernstein now changes his story and Mr. Pileh's probably would not stand up to it, so we have no Pileh in the court-room here, be-

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cause the story is changed. Think that over. Does that create a doubt? Well, we had passed Bernstein. I thought I would not have to go back to him.

This fellow has never been convicted of a crime in his life except vagrancy, and he admits participating in a crime of murder in Brooklyn, in the Bronx, and about the oil can in the death of Shulman; he helped get rid of the body of Feinstein—oh, I forgot, I forgot—way back before he knew any of these defendants, and I don't admit he knows any of them, but before he says he knows the defendants, he was a little playful and he shot one fellow by the name of Whitey Whelan and never was prosecuted. I wonder if he told a little white lie that time—and another fellow whose name was Jerry, whose last name he does not even know, both of them were shot in this Borough of Brooklyn, never prosecuted for that—maybe they feared to prosecute him, and that was long before he was supposed to have known any of these defendants. I wonder if he told little white lies to get himself out of those scrapes. Well, maybe he did. But let us come to what he says here. What is his present status? Because in order to get the background you must know the status of the individual. His present status is the same as Bernstein's. There are no charges against him at this time—no charges. The murders which he admits he committed, he has no charge against him for, even the one in the Bronx where he says he signed a waiver of immunity; he is only held as a material witness. Pretty good pay-off for a man to go on that stand and lie about somebody else to protect his

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own hide, pretty good pay-off, pretty good motive, pretty good incentive for an act of perjury.

Well, you have to have somebody to furnish corroboration, so it might as well be Magoon. Now let us see. I do not know whether you noticed how dissatisfied Mr. Turkus was at the beginning by Mr. Magoon's testimony. I do not know whether you noticed how he struggled to get Magoon to give a conversation. I do not know whether you noticed how Mr. Turkus asked him was the word "luck" used and Magoon answered, "Not that night, the next 'night." And, lo and behold, if you seek the testimony, nothing was ever said about an alleged conversation, about the word "luck" after that question had been asked him. I do not know whether you noticed any of those things or not. I do not know whether you noticed Mr. Turkus walk over to Mr. Klein, his assistant, and start to talk to him, and go back. I do not know whether you noticed that Mr. Turkus even threatened he was going to impeach his pet witness, Mr. Magoon, when I went ahead and raised an objection. I do not know whether you noticed any of those, but they all took place in this court-room, and finally, by a dint of a great deal of strategy, we have two things that Magoon said, two things, and upon those two things you are asked to find a verdict of guilty against this man. The one is a conversation alleged to have been had in the fall of 1938; the other is a conversation alleged to have been had in the defendant's home in 1939. Now, remember, gentlemen, that it is the contention of the prosecution—and I am not going to cover that portion of the testi-

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mony at all—that Magoon was asked to follow this man Rubin. Isn't it significant—and you can have this testimony read; I am not quoting verbatim, to save time, because it is in my memory and it would take too long to give you the pages, but if there is any doubt as to whether what I am telling you are the actual facts, borne out by the written testimony here, that is, briefly, having taken the length of time that it did, you can have it read over. That is clear. That you are entitled to. Mr. Magoon says that in the fall of 1938, first it was Weiss that spoke to him; then it was Strauss that spoke to him. He got orders from Weiss and he got orders from Strauss, and as he was leaving, Capone is supposed to have said something. Here is a peculiar thing. Magoon says that when he was told by Weiss (this is at 2325 to 2327) in the presence of Capone to go to Ratner's Restaurant tomorrow morning, that Magoon testified that he knew Berger for two years. Now, get this in your mind. Magoon said that when he was asked by Weiss to go to Ratner's Restaurant he had already known Berger for two years, so there was no necessity at all of anybody saying anything about who Berger was. He knew him. But Berger testified when he had the conversation, the alleged conversation, with Weiss, that he, Berger, was asked by Weiss, "Do you know Magoon?" and Berger said, "Maybe if I see him I might be able to recognize him." One said he knew him for two years. Poor Magoon is not getting steaks and chops. He is up in the Bronx. Berger and the rest of them are in the steak and chop

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department down in the Half Moon, so they cannot tally as well, so (1) Berger, he does not even know Magoon, but maybe if he sees him he might be able to recognize him. Magoon wants to add it on, lay it on thick, because he only tells little white lies. That is a little white lie, just to add on he knows him when he does not know him. To him that is a white lie. So he said yes, he knew him. That is only the beginning of the conversation. Here:

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"Q. What else did Weiss say? A. He says, 'After you find out what is what, come back on the corner and we'll see what we have to do'—not in those words, but to that effect."

"Q. After the defendant Weiss gave you those instructions, what did he do? After he told you this that you have just told the jury, to meet Berger in Ratner's restaurant, and the other instructions, what did Weiss do? A. I don't know. I left the corner."

This was where Mr. Turkus started to try and get this conversation.

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"Q. Before you left the corner, did you have any talk with either Capone, Reles, or Strauss? A. Not that night."

Compare that. Compare that. It is a physical impossibility that this man is telling the truth, because, according to the testimony of Berger, Berger said that he, Berger, went to East New York that night with Weiss, picked up Harry Strauss; but, of course, Louis Capone is alive, Harry Strauss is dead—he picked up Harry Strauss and then went to Cohen's house, and after leaving Cohen's house Weiss then asked Berger whether he knew Magoon. How do you

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account for it? Berger, the man whom he is supposed to have been meeting, this alleged conversation on the street corner is happening at the same time that Berger says that he went to East New York and went to Cohen's house, in respect to the same subject-matter. It cannot be.

Well, what is the next thing? The next thing is, the following morning he, Magoon, is supposed to have gone to Cuppie's restaurant. This is only an insignificant thing but just shows you how far they go. You remember Berger testified that Cuppie went in the machine with Magoon when they left the restaurant to go up Fifth Avenue. No. You see one is in a jail and the other is in the hotel. Magoon did not get the story right so Magoon's story is that Cuppie went in a car with Berger. Berger's story is that Cuppie went in the car with Magoon. Each one of these is trying to shove it on to the other fellow and they have not had time to tally. But, here is a peculiar thing. Magoon had testified that Goldstein and he and Strauss and a few others were buddies for fifteen years; they visited one another socially; they were out almost every night together; that he and Reles practically slept together and were socially bosom companions. You notice that neither Reles nor Goldstein is brought into either of these conversations. His boss is never around. His boss is never around.

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The Court: Mr. Rosenthal, I will excuse the jury. The jury is excused. Do not discuss the case.

Mr. Rosenthal: I except to the Court excusing.

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(The jury retired from the court-room.)

The Court: I don't want to cause you any loss of face. Don't you want to take that back about Reles?

Mr. Rosenthal: Maybe you misunderstood me. In these conversations alleged to be had, it is funny that Goldstein and Reles were never around. That is in the testimony. I am not saying anything about Reles at this time.

11273 The Court: I thought you meant around here, in court.

Mr. Rosenthal: No; read what I said.

Mr. Turkus: The words were "brought in" that I heard.

The Court: If I understood it that way—

Mr. Rosenthal: You misunderstood.

The Court: —the jury would be quite apt to understand it that way.

Mr. Rosenthal: You misunderstood me. My intention was this, that these conversations they are alleged to have had on this street corner, that neither Reles nor Goldstein were around or brought in.

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The Court: Isn't that far-fetched anyway?

Mr. Rosenthal: No, it is in the testimony that Goldstein was never around. I asked Magoon that particularly. That is one of the questions.

The Court: What about?

Mr. Rosenthal: Because it is contended by Magoon that he, Strauss, Reles and these people are close bosom companions and members of a combination.

The Court: I will undertake this responsibility. In order to avoid confusing the jury, which has not been informed of Reles' tragic death

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during the course of this trial, which is a matter notorious throughout this city, I will instruct you to make no reference to Reles unless there is something in the record showing that he was away. You can take your exception.

Mr. Rosenthal: As long as we are here, the point that I am trying to bring home,—

The Court: I understand your point. What may confuse the Court may confuse the jury.

Mr. Rosenthal: I except.

The Court: I saw Mr. Turkus jump up just as if he responded mentally in the same way.

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Mr. Rosenthal: I did not mean it as your Honor understood.

The Court: You know how I stand. Do not refer to that again.

Mr. Rosenthal: I won't. I have enough other things to refer to. Does the same thing apply to Goldstein, because it is in the record that I asked him whether Goldstein was there?

Mr. Turkus: Goldstein was electrocuted.

The Court: It is worthless as an argument.

Mr. Turkus: That is the way it sounded.

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Mr. Rosenthal: I will take your Honor's ruling.

The Court: I would not mention it. That is my judgment.

Mr. Rosenthal: I will take your Honor's ruling. It is in the record so I cannot help mentioning it.

The Court: Bring back the jury.

Mr. Rosenthal: The opening of Mr. Turkus said that Strauss is dead.

Mr. Turkus: Let me just say this, Judge, for the record. It was brought out, I think by Mr. Rosenthal—

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The Court: Will you let me interrupt, please? Mr. Rosenthal, you understand the danger of this. If, by any possibility, through the grapevine, possibly by passing a newsstand and seeing the screaming headlines about Reles' death and features on the first page, so much as one jurymen has been able to get that fact to the jury it will prejudice your argument and it will cause you to lose face with the jury, if you appear to be in the position, even though mistakenly, of misleading the jury.

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Mr. Turkus: May I say this: More than that, the record of this trial indicates that from October, 1934, to October, 1936, Reles was in jail so that he could not possibly have had any connection with this homicide. It is a very dangerous situation.

Mr. Rosenthal: As long as your Honor took this recess, suppose you take five or ten minutes, Judge?

The Court: It will disorganize the court-room.

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Mr. Rosenthal: I want to review and leave some of the things out which I have.

The Court: You won't have any trouble about that.

Mr. Rosenthal: If you give me five minutes, I won't.

The Court: Bring the jury back.

(The jury returned to the court-room.)

Mr. Rosenthal: In respect to this conversation, gentlemen, of 1938, in the Fall, I want you to keep in mind this, that it was supposed to have been had with Weiss and with Strauss but

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the allegation is that Capone is supposed to have been there. Now, how are you going to ring that in to Capone? He is not supposed to have given any orders. He is not supposed to have given any directions. So, after struggling for a while and trying to get him—did Capone say anything? Did Capone say anything? Did Capone say anything?—they finally got him to say, "Capone said he is hurting Lepke and you got to hit him in the head." Remember, there are three conversations, lasting three nights, during which all of this is supposed to have been gone into; direction, go uptown, go downtown, go to Ratner's, stay up there, come back—given orders, given directions—all this time the defendant Capone is supposed to be a silent observer but here is where Magoon, stationed in the Bronx, away from the Half Moon Hotel, again did not jibe with the other man because he wanted to add, he wanted to add, so he said he told Weiss that there was a cop guarding this man and Weiss said, "We will have to whack the cop, too." What he forgets—in the same conversation that he told Weiss or Weiss told him that as long as there was a cop they did not want to hurt any cop so that they should not do anything to Rubin. Do you remember that? How do you coincide with them? Each one of them is telling the truth. That is the point at issue.

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As far as this man Magoon is concerned, just like I have with the others, I have a number of contradictions which I have not even bothered to tell you of, not only on this trial but on the trial in which he has testified before.

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So that conversation, I think the Court is going to charge you, in so far as it affects the defendant Capone, is not what we would term corroboration.

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Then, say you, why is Capone here and why do we have to judge him? The reason why you have to judge Capone is because Mr. Magoon says that in April, 1939, he went to Capone's home to get a little advice. Isn't it significant, gentlemen, he does not even know where Capone lives. He thinks it is on Avenue K. He thinks it is a couple of blocks away from Utica Avenue. He thinks that it was in 1939 he lived in Avenue K. He merely thinks. He is supposed to be a great friend of this defendant. Why, he went to him for advice. Even though Mr. Strauss and the rest of them were his close friends and buddies with whom he had committed crimes, according to the record here, Mr. Tannenbaum was in on a murder with him, according to the record, and I don't know whether Mr. Bernstein was or not, but he is supposed to have gone for advice. "Mr. Capone, I don't want anything from you; all I want is advice." "Why ask me?" he says, so he says, "Well, I do not ask you. I only came to you for you to advise me." Three years after this killing, this man Magoon is supposed to have walked into this man's house at an address which he does not even know to this day and upon that this man's life—

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Well, let us see. When he spoke of Capone, according to him, Capone said to him, "What are you worried about?" He said, "I worked in the Rosen thing and it was right on Sutter Avenue and I was not made." Get these words. Upon this and this alone rests your verdict in

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so far as it affects the defendant whom I represent. Even if you were to believe this man Bernstein, because if you don't believe him then of course even this does not amount to anything and if you do not believe this, that does not amount to anything, but whichever way you take it, this liar Bernstein and this isolated sentence are all you have in this whole case with the exception of three little items which I will talk about as soon as I finish this—"I worked on the Rosen thing and it was right on Sutter Avenue and I was not made."

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Well, now, according to this man Bernstein—let us go back and see whether we believe his story. Let us see whether we believe his story. Did Capone work on Sutter Avenue? Was Capone on Sutter Avenue? Why, all that is alleged by Bernstein that Capone did was to drive in an automobile on Sutter Avenue and as he was driving along, not even stopping the automobile, he pointed out a store and said, "There is where a man is going to be killed," and drove around through Pennsylvania, Blake and Van Sinderen Avenue and drove around again and again and again and again, so he was not on Sutter Avenue. How could he be made? If this statement is true, how could he be made? What else did Capone do, according to Bernstein, the perjurer, even if you believe him? Why, he stood over on Van Sinderen Avenue, 14 blocks away from Sutter Avenue, 14 blocks away, with an automobile. Are those the only two things which it is alleged by the prosecution that this man did? Then, what is the meaning of this sentence: "I worked on the Rosen thing

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and it was right on Sutter Avenue and I was not made'! Why, the very conversation, all the alleged conversations that were had, were never had on Sutter Avenue. He did not go and watch from a doorway. He did not watch from a park. He did not go over and look at the store. He did not go in and shoot the gun. He did not have the motor running in front of the door. All it is alleged in this case that he is supposed to have done, which is ridiculous, is that he is supposed to have taken this man Bernstein on a ride in Bernstein's own automobile—with a change of face; one time it is supposed to be him driving, the other time Bernstein—and did not even stop in front of the door, according to Bernstein, and pointed out a store and said, "A man is going to be killed." So he was not on Sutter Avenue and if he was not on Sutter Avenue, how could he be made? So you see the ridiculousness of the entire conversation, and upon that a man's life is at stake in this courtroom because that is all that there is, even if you believe Mr. Bernstein, even if you believe Mr. Bernstein. Why, this man who says that when he was first questioned—let us take the background of this man for a second because upon this—I have left all these contradictions and other things out, gentlemen—I cannot leave this out—

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"Q. You do not expect to be electrocuted for any of the murders you have committed, do you?
A. I hope not.

"Q. You do not expect to be? A. I hope not.

"Q. Would you lie to save your own life? A. No, sir.

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"Q. Your answer is you would not lie to save your own life, is that right? A. Yes, sir.

"Q. Did you ever lie in your life? A. Little white lies.

"Q. White lies? A. Little white lies.

"Q. You have been telling little white lies pretty nearly all your life, haven't you? A. No, sir.

"Q. Well, from the time you went to public school and started to steal you told little white lies, didn't you? A. Yes, sir.

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"Q. And you continued on telling little white lies all the way through? A. Just at intervals.

"Q. But you never told anything but little white lies? A. Yes."

There should be wings sprouting from that man. Little white lies! Never interested in school. Never interested in work. Started off from infancy, without the aid, dictation, help, suggestion, or instigation of anybody—the little white lies. Well, let us see about the little white lies. He was questioned way back in 1940. Did he do anything about the Rosen case? Oh, no, not he. Through pages of testimony it appears that this man says that he definitely, both for Judge Foley in the Bronx and for Judge O'Dwyer in Brooklyn, signed a written statement, a written statement he says, with a stenographer present, not one, not two, twenty or more. And he told me—and it is in the record here—I will use their words—it is in the record—it is in the book—he told me that he signed a statement for Judge O'Dwyer, signed it. Where is it? Where is that statement, because you have a right to believe that if he lied once he has put the integrity of Judge O'Dwyer and

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Mr. Turkus in issue here. If he lied then, what assurance have you got that he has not lied to you? Oh, I believe Mr. Turkus. I believe Judge O'Dwyer. He lied. That is what we say, he lied, but what difference is there if he lied about my client or he lied about Judge O'Dwyer and Mr. Turkus? Can you tell me the difference? Little white lies. Little white lies. But the fact is that there is no statement. Oh, there is no statement from any of these men because statements would have to be turned over to the defense and would show whether there has been a concoction among these criminals in the last 18 months while they have been eating their steaks and playing baseball.

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Well, I could tell you about Mr. Magoon's associations and I could tell you about a number of things, but, before I pass to the three short witnesses who made cursory reference to my client, I want to show you this. You know Magoon and Tannenbaum have been close friends since 1933. I want you to get the significance. Magoon says—and I am quoting, Mr. Turkus, from 2425 of the record:

"Q. Did you meet him"—I am referring to Tannenbaum; this is Magoon's testimony—

"Q. Did you meet him (meaning Tannenbaum) at Saratoga and Livonia Avenue at any time? A. Yes, sir.

"Q. Did you see him at Saratoga and Livonia Avenue frequently during the years 1933, '34 and '35? A. Yes."

Then the Court asked a question:

"Q. Was he a member of the combination? A. Yes, sir."

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Do you see the significance of this? Magoon says that Allie Tannenbaum hung out on the corner, hung out on the corner of Saratoga and Livonia, where this defendant is supposed to have been since 1933 and was a member of the combination. Magoon says that he saw him frequently on that corner since 1933 and yet Allie Tannenbaum says that he never knew Louis Capone in his life until the year 1938. Figure it out. Tannenbaum is not trying to help Capone but Magoon is stationed up in the Bronx and is not one of the baseball players so there is no time to tally, there is no time to tally with Allie, so Allie tells the truth in this one instance and has Capone entering the picture in 1938, two years after the killing, but Magoon has got to put him there in 1932 in order to have a conversation in 1939, three years after the killing.

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What more can I say, gentlemen? I say that the life of my client hangs on this alleged conversation three years after a murder, supposedly had in his home, without solicitation of any character by him of the man coming there, and then the man says, he says, "I was in on Sutter Avenue on the Rosen thing", whereas the fact is that he never was on Sutter Avenue so how could he be made, excepting that he rode past in an automobile. Well, let us pass that. I think I have made that impressive enough.

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Well, the District Attorney is going to yell to you, association, association. Let us see. You know it is a pretty far-fetched proposition in this case. You have to get Capone associated some way with the defendant Lepke, don't you, or Buchalter? Well, according to Allie Tannen-

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baum, Allie Tannenbaum, the man who says that he had been working for the defendant Buchalter since 1931, and has been in his office day after day, four or five times a week, and collecting a salary up to 1937, 1938, 1939, says that he never saw Capone in his life, which means either at the place of business of the defendant Buchalter or in East New York, but they have to slip something in so the versatile Mr. Rubin goes on the stand and—listen to this— I think I am insulting your intelligence— “Do you know the defendant Capone?” “Yes.” Never introduced to him. Never saw him in his life except twice. He tried to stretch it to three times on cross and went back to twice. Well, you would think he had a conversation or he was introduced, or something. “What is the first time you saw him?” Now in 1932, gentlemen, in 1932 he saw him walk into a place, had no conversation with him, was not introduced to him, does not know where the place is. I finally pinned him down to the small City of New York with its six million inhabitants and its thousands of miles of streets, including Central Park, but that is as near as I could get him to any particular place, but he saw him walk into a place unknown, the name of the place unknown, the place unknown, the hour, the day, the year, the month, all unknown, but he saw him walk in and—here comes the dirty part of it—suspicion—oh, they are not trying to get the jury to be unfair to these defendants, oh, no—they don’t want any outside influences; they don’t want any suspicions to put a man’s life away. Oh, no. He walked in—remember this—he walked in with Buggy Gold-

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stein, he walked into a room and he saw him for a fleeting glance, fleeting glance. Why, could you remember any person that you saw ten years ago walk into an office and where he walked into? So he is going to say, yes, somebody told him about him; but the point is this, that, according to Rubin, nobody told him anything about him. He was not even introduced and he did not even know who the man was and he does not even today know who he was. The next time he saw him was in the Fall of 1935. I merely asked him one question, did it have anything to do with this case. No. So you see on this man's testimony Mr. Turkus has offered an association between the defendant Capone and the other defendants.

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Well, Mr. Rubin has been taken care of by other counsel. He does not affect me at all, excepting that he says he saw—and remember that in the millions of people that exist, with all the millions of people that exist, nobody ever saw this man any place either in the Raleigh or any other place, nobody.

Oh, Mr. Turkus, you are just as cute for the D. A. as you were for the defense. He asked witness after witness, Shapiro, Mrs. Isaacson, Mrs. Weiss, oh, I don't know how many, "Do you know Farvel Cohen?" "Yes." "Did you know Buggsy Goldstein?" "Yes." Did you know this one and the other one? All the different names, all had aliases. That was done for a purpose. Alias so-and-so. The only one he forgot about was Bill Cody and forgot to call him "Buffalo Bill," but he never asked anybody, "Do you know the defendant Louis

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Capone?" Think it over. Think it over. Sobler—any one of them? Any one of them? He asked Shapiro did he know Weiss. He asked Shapiro did he know Cohen. He asked Shapiro did he know Tannenbaum. He asked Sobler. He asked every one of them. Ah, did not ask anybody about Capone. Now, then, he gives me a winning smile. I suppose he is going to say, why didn't I ask him. I am going to give him a good answer to that. It is not my duty to prove lack of association. It is very, very, very safe to assume that if any one of these men whom he questioned before they got on the stand or after they got on knew the defendant Capone, that would have been the first question that he asked them. But, again, even if I did not ask, you cannot take suspicion; you cannot conjecture; you cannot surmise; you cannot read in. The fact is that according to this testimony it is barren about any association in any of these places.

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All right, the next witness was Berger. Well, Berger is the "hello" conversation, if you remember. Berger said he knew Capone and at eleven o'clock of a night—and I have discussed that before—while riding in Brooklyn with Weiss, Weiss got out of the car and Weiss walked over to Capone; Weiss walked over, they had a conversation outside of his hearing, and then Capone walked back to the car and said "Hello, Berger." and Berger said, "Hello, Capone," and he went away. What is that for? That is to show that somebody saw him talking to Weiss on September 11th. Another suspicion, another circumstance, but you cannot speculate

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as to what was said there. Are you going to speculate a man's life away on what might have been said? Oh, you cannot do that. And even if you were going to do it as to Berger or Rubin, let me tell you this; they are both, in my opinion, accomplices to this crime from their own admissions, from their own admissions, and if they are accomplices they must be corroborated. And why do I say they are accomplices? They got a good pay-off in this case and this cannot be disputed. I want to ask the District Attorney, and I defy him to answer. My defendant was indicted in 1940. That Grand Jury is out of existence. Why, in 1941, after this trial started, after the trial started, after you men were suffering, being taken away from your homes and your families, was it that some unknown Grand Jury that had nothing to do with this case were permitted to have these two men appear before them? I will tell you why.

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The Court: Will you pardon me a minute? Whom are you arguing about?

Mr. Rosenthal: Berger and Rubin. They both appeared. I will give you the pages—

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The Court: Wait a minute.

Mr. Rosenthal: —before the Grand Jury after this trial started.

The Court: You are on a question of law now and for that reason, to avoid confusion, the Court may have to make a preliminary ruling.

Mr. Rosenthal: May I state what the purpose is to your Honor?

The Court: Yes, but you may not argue it to the jury.

Mr. Rosenthal: I can state it up there.

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The Court: In addressing the Court, I will let you state it, without oratory, from where you are. The jury will disregard this.

Mr. Rosenthal: I will go up there. I don't want to have it said I said it in front of the jury. Let Mr. Turkus come up.

Mr. Turkus: There has already been a challenge handed to the District Attorney about a Grand Jury proceedings.

The Court: This does not call for colloquy. Berger was the finger man?

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Mr. Rosenthal: That is right.

The Court: I am going to charge the jury that he was an accomplice as a matter of law. You need not argue that to the jury.

Mr. Rosenthal: May I state the purpose that I had in mind? The purpose is to show that he procured immunity if he appeared before the Grand Jury and testified.

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The Court: You do not have to argue that he was an accomplice. It is a close question because he says he did not know there was going to be a murder, that he thought it was going to be a "schlam", but I am giving the defendant the benefit of the doubt and I am charging the jury that he was an accomplice.

And Rubin, I am going to charge the jury, that I find no evidence justifying the Court in submitting the question of accomplice to the jury as to Rubin; that he must therefore be viewed as a non-accomplice witness.

Mr. Rosenthal: Of course, that is the other defendants. I have no interest in that.

The Court: Yes, I am going to charge that.

Mr. Rosenthal: I won't waste any time.

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The Court: Berger and Bernstein are the two accomplices and the others are not. That is a question for the Court, not for the jury, because no question of accomplice as a matter of fact is going to be submitted to the jury.

Mr. Rosenthal: All right, then, may I just say this. The Court now has informed us of his attitude in respect to the witness Berger.

The Court: The charge has been prepared and I am just anticipating part of the charge.

Mr. Rosenthal: All right, sir. That being so, his testimony again must be viewed like Bernstein's, in other words, it has to be corroborated; but the point that I wanted to bring to your minds was this, that these men did not appear before the Grand Jury until after this trial started and if they were questioned regarding this particular crime, they were given immunity if they did not sign any waiver. Why? You have a right to think. Why did they wait until the trial started and take these two men before the Grand Jury? You think it over. I leave that to you.

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Now, the only one left is the man Allie Tannenbaum and I have already discussed that he said he only met my client in the year 1938. You can take your choice but you cannot speculate. If Tannenbaum was where he said he was, namely, in Buchalter's place of business, every day of the week as well as frequenting Saratoga and Livonia Avenues and a member of the so-called combination as far back as 1932, and frequently on that street corner, and if Tannenbaum never saw or heard of the defendant Capone until 1938, then you can judge for yourselves whether or not

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Bernstein or Magoon is telling the truth because the two things could not be true.

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Now, regarding Magoon, before I pass on to almost the conclusion, I want to call another thing to your attention. You know Tannenbaum told you that when he was questioned up in the mountains he told everything he knew to Judge O'Dwyer. Each one of these witnesses told all he knew when he once determined to talk. Not so Magoon. Magoon said nothing about the Rosen case until 1941. He was questioned twenty times. He could not fix the dates. It was between January and June, 1941. It was after January and he was questioned, questioned, questioned, questioned and questioned and the first time he ever mentioned the Rosen case to the District Attorney of Kings County was in 1941, a year after his arrest. A year after he had been questioned concerning his participation in other matters, and he is the only one who was not asked and did not volunteer. Think that over when you try to give credence to the statement which he made.

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Now, I have covered the testimony in so far as it affects my defendant. You know there are some very peculiar things in this case in so far as it affects my client. Mr. Turkus started out with Judge O'Dwyer starting war on the mob and everybody gets an alias. He started out by giving everybody an alias. I don't know Weiss from a hole in the ground. I don't know what his first name is. It is Emanuel, I understand here, but I know that if your name were Emanuel somebody would call you Mendy. My name is Sidney. Somebody calls me Sid. But they give

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aliases to everybody, alias Mendy Weiss, alias this one, alias that one, alias the other one. I don't know why it is, why we escaped observation. Capone has no alias. His name is Louis Capone. It was that when he was born. It still is that and he is the only one on the indictment that has not got some kind of a cognomen pinned to him. I forget some of these names. I tried to remember them. They certainly are good. Tear-eyed this one, Buggsy the other one, Cuppie the other one, Cock-eye the other one,—all kinds of names, but, thank God, they have not pinned any on my client. Now, that is number one.

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Everybody is running all over the world, Tannenbaum, Bernstein—Florida, California, God knows where. They even have Weiss—and his lawyer has explained the reason, Kansas City, Denver, Texas—you have the map of the whole United States and everybody is running, everybody. Tannenbaum ran, Bernstein ran, everybody. There is no proof that Louis Capone was not home with his wife and his children until his arrest. He did not run. He did not run.

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Well, everybody is connected with unions. I heard figures so great in this trial that I started to get dizzy. I had to walk outside when I thought that I was supposedly educated, went to school and the years that I have studied and the work that I have done; it made me dizzy I confess. But is there a word of anything concerning Capone in any of them?

Well, another thing struck me. Why didn't Rubin, Berger or Tannenbaum say that in any of the conversations allegedly had with either Weiss or Buchalter that Capone's name was men-

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tioned? Not a word throughout. Why, even there is an alleged conversation with the defendant Buchalter in which it was said or alleged to have been said, "Why do you worry?"—I think to Rubin—"They are looking for Cohen and Weiss and Shimmy." No mention of Capone, assuming that that conversation actually took place. I am now taking the face value of these alleged conversations.

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Well, the witnesses, Mrs. Isaacson, Sidney Weiss, Blanche Weiss, Sobler, Carl Shapiro, and Berger, even Berger—you remember how Berger said that he hung out in Blum's candy store next to the station house over in New York, you remember that—and he was asked who hung out there and then you had another description of your Allie Tannenbaums, this one, that one, the other one. No Capone. Not one of these persons who took the stand, questioned—oh, I think one of the defense witnesses, Shapiro, that was called was questioned, I do not know, for a day or a day and a half—but not one word by Mr. Turkus, "Do you know the defendant Capone?", not one word, not one word.

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Well, of course, Berger says he would lie to save himself from prison but not from the electric chair. Tannenbaum at least is truthful enough to say that he would die to escape the chair. But Magoon, n-n-n-n-n he would only tell white lies. He would not lie, not that big, soft-hearted Magoon. He would not lie to escape the chair.

Well, by now you should be tired of listening to my talking. I think I have spoken longer now than I have throughout the whole trial, with

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the exception of the time that I examined Mr. Bernstein and the time that I examined the little white liar. I think that would make a good one for Walt Disney. I might be able to make a little money on it. I have tried to keep you interested, gentlemen. I may have appeared facetious at times. If I did outwardly, I don't inwardly. The task which any man has, whether it be the District Attorney or defense counsel, is a very trying one. It is trying on their nerves. Even the Judge gets irritated. We all do. We are human beings. I do not know whether I have covered the things or not. As I lay awake last night, knowing that I had to sum up to this jury, a million thoughts went through my mind. There is any amount of things which I have not covered which I feel in my mind would convince any ordinary man, and I am only concerned in so far as my defendant is concerned, of the innocence of my client; but then, when you get up on your feet, you look at twelve men who have sat here, tired, want to go home, being kept away from their families, their friends, their associates, you wonder whether or not you could not over-do a situation by trying to impress things on them which they as ordinary common-sense individuals would ordinarily think of anyway.

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You see there is nothing strange about jury duty, even though you have got a tough job. There is nothing strange about it. Why do we take twelve, as I said at the outset, rather than one? You know it is a moulding of opinion which makes the United States what it is in this troubled world, moulding together of the opinions, the thoughts, into one because if that were

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not true, there would be no necessity. How easy it would have been for me, if we would have had a separate trial. There would have been no five week jury; there would have been no five week trial, because, as far as the evidence in this case is concerned, our evidence would have been in in less time than it takes to snuff out a candle, practically or figuratively speaking.

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You men are all of different walks. Each one of you has had different experience. That experience fits you to pit your mind against the other man's. That experience gives you the power to analyze in a different method than your fellow man. So that when you go in there and you argue among yourselves, without stubbornness, without rancor, without bitterness, you can see the light as others see it and you can see whether there is a fallacy in your argument and whether the argument advanced by others is a better argument, and then when you finally come down to moulding, moulding, moulding into the final form, you are able to say whether the State has proved its case. Well, I would rather the job was yours than mine. It

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is a disagreeable duty to anybody. I imagine it is disagreeable to Mr. Turkus or any Assistant District Attorney to have in his charge the prosecution where a man's life, finally pronounced by the Judge, may be at stake. It should be a hard job but, in the final analysis, whatever he thinks, whatever I think, whatever the Judge thinks, has nothing to do with you. The facts remain with you and you alone. That is our law and if that is carried out, gentlemen, no man can be heard to complain.

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Now I say, and I think the Court will agree, I want you to listen carefully because law is foreign to most of you men, but the law in this case is a very important thing to me because if, when you listen to the Judge charge the law, he says to you: "Gentlemen, if you disbelieve Bernstein and if you believe or disbelieve the outside or alleged outside evidence, or if you believe either of them, you must acquit; if he says to you that there must be other evidence of an independent nature which you believe, tending to connect the defendant with the crime or you must acquit; if he says that in so far as the defendant Capone is concerned the People only seek to prove his guilt by the isolated statement of the little white liar Magoon and that even though you may believe Bernstein, which I consider to be physically impossible, even though you may believe him, if you disbelieve the statements or if it is insufficient to convince you that it is of such a nature as tends in your mind to connect this defendant with the crime, you must, whether you like it or not, whether you like his associates, whether you like his past life, whether you like his record, which of course is not in issue here, no matter what it may be, whether you like his face, whether you like my face, whether you like his wife, whether you like his children, whether you like his nationality, whether you like his religion, it does not make any difference what you like, it does not make any difference what you dislike, if in this case the Judge charges you that there is but one and one thing only that would justify you in finding a verdict of guilt in so far as it

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affects Capone and that is the statement of the little white liar Magoon, supposedly issued three years after the murder, in a house where he does not know where it is or where it is not, in the presence of nobody, and in the uncertain manner in which he has already testified, you must acquit this defendant."

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All I ask of you is, when you listen to the Court charge you as I am sure the Court is going to charge you, that as far as the defendant Capone is concerned, there is nothing in this case except the word of an alleged accomplice Bernstein who alone cannot convict and the alleged statement to Magoon whom you must believe in its entirety and be convinced of the truth beyond a reasonable doubt before you can convict, if you hear that from the Court and if you have agreed with my interpretation of what the evidence is in so far as it affects, (1) the man who had the temerity to sit before a jury in a box and say, "I am telling the truth" as he did in this case and then tell you that he deliberately perjured himself, and the man who had the temerity to sit in this box and tell you he was telling the truth and then had the temerity to perjure himself, so that even the Judge said he is a liar; (2) Magoon, a man who would not lie and never lied in his life except little white lies, acquit this defendant; and I expect, gentlemen, knowing the attention which you have given to the evidence and to me, that you will do that.

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I want to thank you sincerely for your attention.

The Court: Gentlemen of the jury, tomorrow

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is Saturday and we will resume at ten o'clock in the morning. I just want to say this. Please listen very carefully. This is a lengthy and very important case. It is desirable that your deliberations will not be forced, will not become hasty at the last minute from natural desires to be at the family firesides. I feel the same way as you do. I am very anxious to get through with the case, but the thing to have uppermost in our minds is that regardless of all other considerations, the steadiness and the deliberate procedure which has been followed up to the present time is necessitated by the importance of the issue in a case in which substantially a million words of testimony and otherwise are on the record. So we cannot get fussed at the last minute and have an abortive verdict. I hope that the case will go to you tomorrow. I hope that I may see things shape up so that it goes to you tomorrow so that you may deliberate. The law permits it to go on Saturday and permits the taking of a verdict on Sunday. The law does not permit the Court sitting on Sunday to take evidence or to charge. If, in the event that we don't finish tomorrow, because I cannot absolutely promise it, I am going to ask you to all be good soldiers for a little while longer. I am apt to go on vacation when this is through and it is delaying me the same as it is your anxiety to remain home. If by any mischance this case does not go to you tomorrow, then something has come up which may necessitate that on Monday morning we won't be able to work. One of the counsel has to be in the Court of Appeals and that takes precedence over this trial. However, I am with you heart

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and soul and hoping for the best results. My main worry is whether or not my voice will hold out for the charge. If it holds out for the charge, you will have the case tomorrow, but I cannot give a hasty charge in this case. It is going to be a lengthy charge. I will do my best.

Do not talk about the case, let nobody talk to you about it. Keep your minds open. Remember all other admonitions.

The jury may go.

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The defendants are remanded.

(Thereupon an adjournment was taken to November 29, 1941, at ten a. m.)

PROCEEDINGS, November 29, 1941.

(TRIAL RESUMED.)

The Court: There must be no interruption at any time during the summation.

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(Mr. Turkus made closing address to the jury, as follows:)

May it please the Court, Mr. Foreman, gentlemen of the jury:

No one who has sat through this trial can avoid being cognizant of the fact that for the past eleven weeks, in devotion to the performance of your duty as jurors, you have made sacrifices. You have been away from your personal affairs, deprived of the comfort and society of your loved ones at home, in devotion of your

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duties as jurors, to the end that the People of the State of New York may live without violence and without outrage at home, in peace and security, and the right to live without spoliation.

I trespass upon your time for just a moment to express my appreciation to Judge O'Dwyer for designating me to conduct this prosecution and to express my gratitude to my associates, Mr. Klein and Mr. Josephs, and to all law enforcement agencies, agents of the city, county and Federal, who have participated in the gathering of the evidence in this, a five year old murder.

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Counsel for the defense are to be complimented for giving all their talent and energy to the most difficult, and I might say hopelessly difficult, case for the men at the Bar, to the end that the defendants on trial may have given to them and secured to them every legal and constitutional safeguard that the law of the land permits.

Never before in the history of criminal jurisprudence has there been brought to the Bar of justice at one time the "boss"—the man behind the scene—described by his own lawyer as the czar of the industrial rackets, with a half a million dollar take on one racket alone; number two, behind the scene, who directed the murder; and, number three, Lepke's lieutenant and triggerman, who fired the lethal shot. Never in the annals of criminal jurisprudence has the District Attorney so conclusively and irresistibly, fact upon fact, established a moving picture, a veritable moving picture reenactment, of the crime of murder in the first degree, as was portrayed to this jury in this court room in the

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five weeks of testimony by thirty-five witnesses and fifty-eight exhibits.

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Can five weeks of testimony be erased from the jury's mind by the talents of defense counsel, whose technique was an education to the members of the Bar who sat through, week after week, in that other jury box. Every legal stratagem that the law of the land afforded was employed in behalf of Lepke, Capone and Weiss. It is true, as Mr. Talley said, that justice has been portrayed by the figure of a woman with a blindfold, as she evenly balances the scales of justice. That is something he lifted from my summation without benefit of the author in the Goldstein and Strauss case, but, nevertheless, it is true.

The Court: No, just confine yourself to the record.

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Mr. Turkus: That record is before the Court. However, that is a symbol, gentlemen—a symbol with us that justice does not differentiate between the high and the low, the strong and the weak, or the poor and the rich. Yes, justice is blind to these things, but that does not mean that justice is deaf, dumb and blind, nor are jurors either. It is unthinkable that sometimes orations or talks of counsel can so befuddle an American jury that they can blot out of your minds week after week of testimony and make the evidence meaningless. There is only one issue in this case—only one—are these defendants at the Bar guilty as charged or are they innocent? That is the issue that has to be decided with common sense and understanding, and I hope, as I go on, that my personal feel-

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ings are not reflected in anything that I say to you, for it is not my personal feelings that matter, nor my inferences that I draw from the testimony, but yours and yours alone. And if there is anything that I say that does not agree with your concept of the evidence, disregard it. I tell it to you as an inference as I see it.

What is more powerful than the facts? Five weeks ago the District Attorney set forth what he said the proof would reveal in this court room. Let us analyze and reason. I will take you through the opening statement, sentence by sentence, paragraph by paragraph, to refresh your recollection, if that, indeed, needs any, that every fact stated therein has been conclusively proven and that the guilt of Lepke, Capone and Weiss has been established beyond the shadow of a doubt. Five weeks ago the District Attorney said he would establish that shortly before seven o'clock on the morning of Sunday, September 13, 1936, a uniformed police officer who was patrolling his beat on Sutter Avenue suddenly observed a man in the middle of the street frantically waving both arms, shouting, "Police, murder." The police officer ran to his side. The civilian quickly blurted out a story. The officer dashed into the candy store located at number 725 Sutter Avenue. Inside he saw a ghastly sight. There on the floor of this little candy store lay the proprietor, Joseph Rosen, flat on his back, with his arms outstretched, his face, neck and shirt were drenched with blood, pools of blood flowed from the body in the direction of the counter. Scattered newspapers were strewn on the floor. The body was at an angle; he was facing toward the rear; feet facing to-

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ward the front and side, legs spread apart. The eyes of the corpse were wide open, staring toward the ceiling. That is paragraph number one. Has that been proven beyond the shadow of doubt? Is there one person in the court room that can deny each and every fact therein stated has been proven? There it is—a visual picture of it, taken the day of the murder.

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Continuing with the opening—"The police officer questioned the civilian. He was a tailor who lived across the street. At approximately 6:45 A. M. the tailor heard a series of shots ring out of the quiet of that Sunday morning. The tailor looked out the window. He saw an automobile pull away from in front of the Rosen candy store and start down Sutter Avenue. As the car drew away from in front of the store, the tailor saw the body of a man lying on the floor of this candy store. Whereupon, the tailor followed the car with his eyes to get the license number. As the car was going down Sutter Avenue, and before it reached the corner of Wyona Street, into which it turned, the tailor memorized the license number of that car. The policeman then telephoned an alarm: an alarm for a black sedan, license number 'L-1677', with four occupants." Hasn't that been established beyond all question? Is there a single individual in court who doubts a single sentence or paragraph of that representation of proof? Can you forget the tailor, Stamler, the grocer, Regenbogen, the officer who gave the alarm?

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Continuing with the opening: "Radio cars converged at the store, detectives and command-

ing officers arrived. The ambulance surgeon who responded pronounced the victim "Dead on arrival". The body and the scene of the murder were guarded and remained untouched and undisturbed pending the arrival of the Medical Examiner. Photographs were taken by detectives of the photo gallery of the Police Department." Is there a single word, a single sentence, that has not been proven beyond a reasonable doubt in that paragraph? There are the pictures, every one of them, before your eyes, taken at the time of the homicide. The ambulance surgeon did pronounce him, "Dead on arrival"; the body was removed to the Morgue.

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Continuing with the opening—representative of the proof that the District Attorney of this county said would be submitted to you—"Doctor Marten, Deputy Chief Medical Examiner of the City of New York, arrived and made an examination and inspection of the corpse at the scene. He then ordered the removal of the body to the Kings County Morgue, for autopsy. There, and prior to the autopsy, Harold Rosen viewed the body and identified it as being that of his father, Joseph Rosen." True?

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And from the opening: "The autopsy revealed that Joseph Rosen had virtually been riddled with bullets—his body had been pierced with seventeen entrance and exit bullet holes." True? "One bullet entered the left side of his face near the ear and came out in the back of his neck on the right side." True? "The second bullet entered at the lower left jaw, passed through the brain and lodged itself in the temporal muscle on the right side of the head,

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where it was recovered by the Medical examiner." True! "A third bullet entered on the left side of the neck, went from left to right almost horizontally, and imbedded itself in the back of his neck. This bullet was likewise recovered by the Medical Examiner." True! "There were thirteen other entrance and exit wounds where bullets had punctured and penetrated the chest, shoulder and neck of the victim." True! Do we have to take the autopsy report and medical testimony of Doctor Marten and trace it again, bullet by bullet?

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Continuing with the opening—and this, gentlemen, is factual—factual—not any summation, not any oration appealing to hatred and race—not any race appealing to baser motives in behalf of Lepke, Capone and Weiss. That is something that rancored me for three days, this summation which went on—eleven hours of oratory. I had to sit here three days listening to it, and those three days of summation were more telling on me than the entire twelve weeks of this trial. I will come to that in a moment. So, if I appear to you to be unduly protracted in this summation, may I receive your indulgence. I am not here to wrap Lepke in an American flag, or drape the hammer and sickle around Rubin. I am here to talk facts, through the opening. "Two bullets," as stated, were recovered by Doctor Marten on autopsy. The bullets are in envelopes and I can bang them on the desk here—there they are, the two bullets. "Four bullets were pried out of the floor directly beneath the victim's body," and the four bullets that were pried out of that floor were here described as being within a nine inch circle. Bear that in

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mind—four bullets removed from underneath the body, about in a nine inch circle—some marksmanship. “Another was extracted from the floor near the body, and still another bullet which passed through the wall of the candy store was recovered on the floor in the millinery shop next door.” The recovered bullets were sent to the ballistic bureau of the Police Department for examination. There they are (indicating). Is there a single sentence, or is there a single word, in the representation of proof that has not been established beyond the shadow of doubt?

11366

Continuing with the representation of proof by the District Attorney: “At approximately 10:40 that very Sunday morning, on Van Sinderen Avenue, about twenty-five or thirty feet north of Livonia Avenue, in the Brownsville section of Brooklyn, a detective discovered an abandoned automobile bearing license plates, ‘L-1667, N. Y., 1936,’ the very car for which the alarm had issued.” True? The photograph taken on the day of the murder and the discovery of the car—another view—and the detective’s testimony. “This car was a Chevrolet, two door—” the two door is important, because one of the defense counsel said—and by the way, I am not here to apologize for the character of any witness that the People of the State of New York put on the stand. Who did you expect the People to bring into this court room after the *voire dire*, or preliminary questioning of the jury? Did the District Attorney conceal a single thing from you? Did you expect that he would go to the halls of Harvard University

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and from there bring down professors to talk of these men? Or, perchance, to bring choir boys here to speak of them? We brought men here to speak of them who knew them—men to speak of them who associated with them—men to speak of them who broke bread with them and who committed this murder with them. And the responsibility for the production of those characters upon the stand does not rest with the District Attorney; it does not rest with the Court, or with you. It rests with them—the three of them. They alone were responsible for the production of those characters in the court room. It is not their character we are here to ferret out. The thing is, do their past associates speak the truth of them on the Rosen murder.

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Let us get along with the representation of proof, sentence by sentence, paragraph by paragraph, facts—facts: "This car was a Chevrolet, two door, four passenger, hard top vehicle, black in color, now commonly called a coach. The place of abandonment of the vehicle was close by the I. R. T. and B. M. T. station and railroad bridge at that location." True? Look at it. You heard the testimony. There it is, the picture, taken the day of the murder. True? Is there a single person in this court room that doubts a single sentence or paragraph?

11370

Continuing— And this, gentlemen, I am reading verbatim from the opening statement of the representation of proof, sentence by sentence, word by word, paragraph by paragraph: "The operator of the candy store and newsstand at this station actually saw this car abandoned at about 7:00 o'clock that Sunday morning. Four

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men got out of the car and walked up the stairway to the left of his stand. This stairway permitted access to the I. R. T. station and to a bridge which crossed over the railroad tracks, and had an exist a block away on the other side. The newsstand operator paid no special attention to the men and could effect no identification of any of them." True? Is there a single representation there not proven conclusively? Here is the picture—there is your entrance—not only to the I. R. T. but the B. M. T. and the railroad—the bridge across the railroad tracks with the exit on Junius Street. Is there a single man that doubts that Merlis, the operator, saw four men get out of that abandoned car, and that he saw them go up that stairway, and that he could effect no possible identification of any of them? Was that a good spot for the abandonment of the car? In the event the police pursued—mind you, if Cappadora, that patrolman of the Honor Legion of the Police Department, had come by ten minutes before as he was patrolling Sutter Avenue, and that black Chevrolet careened down with those four killers in it, what do you think would have happened to Cappadora? And assuming there were other police that took up the pursuit, gentlemen, what do you think about that for ingenuity, for a place of abandonment of a getaway car in a murder? A waiting car on the other side of the bridge—two of them—for a getaway, to get lost in the subway, to get lost at the railroad. Does that look like the work of amateurs? That showed the brutality—that showed the cunning—that showed the cold-

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hearted planning and deliberation and premeditation.

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To continue with the factual opening, and the representation of proof: "The abandoned Chevrolet coach was a stolen car; it had been stolen from the Crown Heights section of Brooklyn some time between midnight of Friday and 9:00 o'clock in the morning of Saturday, from in front of 621 Lefferts Avenue, where it had been parked overnight by the owner, near his residence. The discovery of its theft and the report thereof was made by the owner on Saturday morning, and a police alarm then sent out for its recovery." True? Didn't we bring from Peoria, Illinois, the owner of that automobile? Didn't the District Attorney bring here the policeman who received the alarm? Isn't there a picture of the very spot where the car was stolen from? True? Is there a single person in the court room who can legitimately doubt a sentence of that representation of proof?

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To continue with the opening: "The license plates, L-1667, affixed to the Chevrolet, were not the license plates which had been issued for the car by the Bureau of Motor Vehicles." Is that true? "The license plates, L-1677, also had been stolen, but from a different vehicle, namely a Ford, which had been stored in a private garage on East 96th Street, in the Brownsville section of Brooklyn. The owner of the Ford automobile had last seen it the day after Labor Day when he put the car away and locked the garage doors. The discovery of the theft of the plates was made the very morning of the murder when detectives came and interviewed the owner of the

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plates. Accompanying the detectives to the private garage, the owner discovered for the first time that the padlock had been broken and the plates were missing." True? Is there a single human mind that can dispute a single factual representation in that paragraph? Didn't you have the barber here, who owned the car? Gentlemen, he told you how he locked it up, in the garage. Didn't he tell you how Detective Ambraiz came and went to the garage with him, and that he discovered for the first time that the plates were missing? They talk about atmosphere. Captain Ambraiz, formerly Detective Ambraiz, from the New York City Police Department—the commanding officer of the Military Intelligence Corps of the United States Government in the Second Corps Area, was brought here to the stand in his civilian suit. They talk about "atmosphere" when they even put that Sammy on the stand in his Army uniform—forgetting entirely the "Major" (Kleinman), whose contribution to this case was nil. And they talk about "atmosphere".

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Continuing with the opening—and these are facts, gentlemen—fact on fact: "Under the direction of Captain John J. McGowan, the commanding officer of the Brooklyn Homicide Squad, in charge of all detectives in the Homicide Division in the Borough of Brooklyn, photographs were taken of the stolen car. In addition, under his supervision and direction, a chalk and mercury mixture was dusted on the windshield, the body of the car, the license plates, the inside mirror, and all other places where there might likely be fingerprints, in an endeavor to bring

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out fingerprint evidence. The search for fingerprint clues was fruitless." True? Is there a single individual in the court room within the hearing of my voice, who recognizes candor and sincerity, who can doubt a single one of the representations of that proof by the District Attorney? Hasn't that been established beyond the shadow of doubt? That is significant, because that shows, too, when there are no fingerprints, when there are no clues, that this was done by somebody with cunning, somebody with a coldblooded, brutal mind.

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Continuing with the factual representations: "Far away from the place where the murder car was abandoned, a pedestrian, shortly after 11:00 o'clock, the very morning of the murder, walking along Ralph Avenue, at a point about one hundred feet north of Church Avenue, discovered a gun in the grass, near the sidewalk. He picked up the weapon, looked at it, and carried it over to a police officer directing traffic in that vicinity. Quickly, notification of this find was given to the detectives working on the Rosen case. The gun was sent to the Ballistic Bureau of the Police Department for inspection and examination." I want to show you that I am taking it word for word, fact by fact, so as to show you conclusively that every representation of proof was carried out by the District Attorney. Is there a single individual who can deny that? The finding of the gun. Here it is (indicating). Police officer Nelson, who testified in court, corroborated the finding. Is there a single individual in this court room that can

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doubt his very senses? You can have it, here it is (indicating).

Continuing with the representation of proof: "The Commanding Officer of the Ballistics Bureau personally conducted the examination and inspection of the weapon. This gun was a Colt 38-caliber, police positive, special." True? "In an endeavor to trace the serial number of the gun this ballistics expert made an examination of the gun at the three points where the serial numbers should have been." True? "There he discovered that the numbers had been mechanically removed and obliterated, so that they were not visible either to the naked eye or with a magnifying glass. Then with acids he attempted to bring out or restore those serial numbers by etching, that is, bringing to view a ghost-like number which then gives you what the number was before it was obliterated." True? "The obliteration, however, had been too thorough and the expert was unable to bring out the serial number or enough of it so that a trace could be made." True? "In addition to the obliteration of the numbers, the gun had received other mechanical treatment after it had left the factory. At the muzzle end of the barrel a thread had been cut." True? "This had been cut for the attachment of a 'silencer' to muffle or do away with the sound of a report." True? "The 'silencer' was not affixed to the gun but the threading for it was covered by a 'collar'." True? Not the usual kind of a gun found in an empty lot!

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Continuing with the opening—

The Court: Keep that weapon in its place on the desk.

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Mr. Turkus: May the record indicate, so there will be no misunderstanding, the only time I held that weapon was while I was going over the opening and going over the factual parts of it.

The Court: When you made your last reference, that is correct.

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Mr. Turkus (Continuing): Continuing with the factual representations: "As I have already related, eight bullets were now at the Ballistics Bureau for examination. Of the eight, you will remember, two of the bullets had been extracted from the body of Joseph Rosen by the Medical Examiner, and the remaining six bullets had been found at the scene of the murder." True? "Four of these eight bullets were half metal-case bullets and the other four were copper-coated bullets." True? Four of the eight bullets were half metal-case bullets and the other four were copper-coated bullets. True that there were two different types of ammunition? "One of the bullets recovered from the body of Joseph Rosen by the Medical Examiner was a half

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metal-case bullet, and the other was a copper-coated bullet." You remember the distinction—half-metal case is a metal jacket over the lead nose, and copper-coated is copper plating over the entire lead nose of the bullet. Two different types of ammunition, although of the same calibre. "The eight bullets were, microscopically examined and tests made. The tests revealed that the four half metal-case bullets were fired from the very gun found in the lot—" the gun which I just turned over to the clerk—"whereas the four copper-coated bullets had been fired

from another gun, of similar make. The gun, however, which fired the four copper-coated bullets, was never recovered." True? Is there a single factual reference not conclusively established in that paragraph and in that representation of proof?

Continuing: "Thus, briefly, the proof discloses that in advance of the murder an automobile was stolen from the Crown Heights section of Brooklyn; the license plates were stolen from another car in the Brownsville district, the stolen plates were switched to the stolen car; the murder was committed; the killers fled from the scene in the stolen car; they abandoned the car at the railroad bridge, and escaped without identification." True? Is there a single person in this court room who disputes a sentence of that? "Not a single fingerprint clue was found on the murder car; only one of the guns used in the killing was found, but that with the serial numbers obliterated, blocking trace of its sale and ownership. In short, the killers had made a clean getaway and left no clues in their wake." True? True, of September 13, 1936? And one lawyer wanted to make capital of that isolated sentence, and read to the jury, "In short, the killers had made a clean getaway and left no clues in their wake," to confound and confuse. As of September 13, 1936, when the blood drenched body of Rosen lay in the candy store," that was true, the killers—the men who fired the shots—the four men who made their getaway, made a clean one and left no clue in their wake. True?

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And to continue: "This is the point, gentle-

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men—" remember, too, that we discussed this five weeks ago when I said, "This is the point, gentlemen." So I will repeat, "Where we naturally ask ourselves what is the proof as to why the proprietor of a penny business should be the victim of a brutal murder, carried out with flawless technique. Who was this Joseph Rosen?" And one of the defense lawyers gets up and criticizes the technique of the murder. It was good enough to be an unsolved murder for four years. That is how good that "technique" was. The lawyer finds fault with the experts who did it. "Who was this Joseph Rosen?" Do you remember how I said that five weeks ago, after five weeks spent in the selection of a jury?

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Continuing with the representation of proof by the District Attorney: "Joseph Rosen had been a candy store owner in the Brownsville district only a few months. All his adult life he had been in the clothing trucking business, starting as a driver and working up to a partnership in the business." All right—I used the word "partnership" five weeks ago. The trucking concern in which he was a partner was disrupted. Rosen was forced out. Had he only been in the Brownsville district as a candy store proprietor a few months? Had he been a truck driver? Had he worked himself up to a partnership? Was the business disrupted? Was Rosen forced out? I don't care whether Rosen's business was worth five cents or \$50,000, from the standpoint of motive in this case, and we will discuss that as we go along. They talk about atmosphere, and bring in here a lot of

"contracts" and a lot of papers to tell you that the business was poor, wobbly. What difference does it make? But I will point out to you, Rosen, if he had a five cent business, was a truckman who had to be dealt with. We will come to that in a moment.

Let me continue: "The defendant Buchalter and others manipulated the deal." I will go into that a little later when I "break" it from within. "Rosen, through Buchalter and a union official, was put to work as foreman." Gentleman, you heard Lepke's lawyer in the examination of the People's witness try to bring out that Lepke, the undisputed czar of rackets, as his lawyer painted him, became a public benefactor and put Joe Rosen to work. "Several months later Rosen was discharged." True? "Then he walked the streets endeavoring to reinstate himself in the clothing trucking industry, complaining that Buchalter had put him out of business." True? Didn't he make complaint? Have you forgotten what he said to Rubin? Have you forgotten how his wife came to the clothing district and how it was reported to Lepke again and again that he had been heard squawking, "about us"? Did he make complaints? Do you think that is the only complaint he made to people in the clothing district? Use your heads. Did he make complaints? "Finally, Buchalter and this union official put Rosen to work again, but this time as a truck driver." You now know that this "union official" was Max Rubin. True? The defense starts off with the boss, Larry Cooper, who put him to work as a truck driver, and who admitted he had to make a switch, just like Rubin

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said, and take Max Cranes, the little guy that Louis Cooper did not want but was forced to take after Lepke said so—took him, Cranes, away from Larry, and switched him to Louis, and put the victim, Joseph Rosen, to work for Larry. True? Is there a man in the court room that doubts that? "This job lasted only a short time and again Rosen was out of employment." Ah, you talk about atmosphere, you talk about a "smoke screen", you talking about trying to confuse a jury. Gentlemen, they are too smart to think they can "finagle" twelve; they only want to get one or two with a little doubt. You have been together twelve weeks, you have been locked up five; throw a "smoke screen", get one or two confused get the jury fighting with each other, get them mad at one another, break the whole thing up, hang the jury, play for one or two, you cannot fight twelve. Are you going to fall for that kind of a "smoke screen"? So they try to work on one or two. Get the jury fighting. Ah, yes, "technique"—that is "technique". But, as I said, justice is not deaf, dumb and blind, nor are jurors.

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"Ultimately, Rosen ended up in the little candy store in Brownsville at 725 Sutter Avenue." True?

Continuing with the factual opening: "In the latter part of the year 1935, the Honorable Herbert H. Lehman, the Governor of the State of New York, appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into: (1) Any and all acts of racketeering and vice; (2) Any and all acts of organized crime or any other crime; (3) Any

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connection between such acts and any law enforcement officials, committed or alleged to have been committed by any and all persons, including public officers, within the County of New York, in violation of, and so forth. Thomas E. Dewey was the Special Prosecutor designated to conduct the investigation." True? You know that of your own knowledge, and if the Court does not take judicial notice of it, there it is—photostatic, exemplified, certified photostats, and everything you want. Proof of it? True? When Dewey was appointed, do you think that Lepke's lawyer, who designated him in this court room as no "angel", but who, in fact painted him as he was—the czar of industrial rackets—do you think that meant something to Lepke, with half a million dollar take, that his lawyer talks about now? Oh, you talk about "atmosphere"! Oh, is Lepke running away from Dewey when you get Rubin on the "lam" at Lepke's instigation—making him run from Dewey! Next month when he is over in Manhattan, he will have somebody running from O'Dwyer.

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What is the difference, gentlemen? Can you conceive of this Rubin situation? I will come back to that in a minute. If a prospective Dewey witness, do you think that Dewey is going to let that go by? Brooklyn—New York; Brooklyn—New York. Is he running from Brooklyn or from New York? If somebody has two things on you, one in Brooklyn and one in New York, and you put him out on the "lam", common-sense is that you put him out on the "lam" for both—particularly when they are away. Calling a Dewey witness in Brooklyn a prospective Dewey witness

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in Brooklyn, and then coming in here and juggling—having mental acrobats, or tight-rope walkers, to confuse and finagle twelve men? Not on your life. One or two is the hope.

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Continuing with the factual opening: "Several months after the Dewey investigation got under way, Joseph Rosen threatened to go to Dewey and tell what he knew." True? Does anybody deny that? "In an attempt to silence him, \$200. was turned over to Rosen in his candy store, and he was told to go out of town and stay out until everything blew over." True? With \$1.20 in the bank, Rosen came home to his wife with \$200. and had to leave town. That was known in 1936, but you cannot establish that fact, because if the wife testified as to what the husband told her, the law is that is hearsay—it is no good. But that was known in October, 1936. That is significant, because even in 1936 there were certain things known—not enough to bring the case into court—not even enough then to get an indictment, to establish what is known in law as a *prima facie* case. "Rosen took the \$200. and he did leave town, but he stayed away for only a few days and then came back." Is that true? Did he leave Brooklyn? Did he go to Reading, Pennsylvania? Did he speak with his son? Have you forgotten the testimony of Mrs. Rosen on the telephone call, the condition of her health and then Rosen came back? Is there a single human being with an ordinary mind who disputes a single representation of that proof?

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Continuing: "Thereafter, Rosen again threatened to talk. On September 13, 1936, in the manner that I have already described—" Do

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you remember how I said that? "--Rosen's lips were forever sealed." Weren't they? Weren't they? And then I said to you five weeks ago, "Nothing happened; weeks passed; in fact, year after year went by—still nothing happened." True? True? "In May, 1940, something did happen. The case was broken from the inside." Ah, some lawyer said, "Let them prove that." How glad I am he said that, because, if by now he himself is not convinced—and if he did not have his tongue in his cheek when he said it, like one of them said, "The District Attorney is a paid advocate." Are the three of them here for their health? Is the pay I get from the County of Kings tainted, in comparison to what pay they have gotten from Lepke, Capone and Weiss? Is there a million dollars that would make me, a young man with the blood of life going through my veins, understanding all that it means to live and breathe—is there a million dollars that would make me frame the three of them? A flower in one hand—these lawyers—the greatest preparation I ever saw. "The great District Attorney's office. Judge O'Dwyer, a man of unquestioned integrity." I would not say a word about Talley, a flower in one hand, and the defendants with a stiletto in the other. An "architect" was Rubin! He was an "architect". That kind of an accusation, gentlemen, is what had me this morning, and that is what had me for the last three days of this summation. Think of it, gentlemen, when they don't do any damage with a flower, Talley just came out with a hatchet. Think of it, accusing Judge O'Dwyer and Burt

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Turkus and Sol Klein and Lewis Joseph and every law enforcement agent that had something to do with this case, of murder, of an attempt to kill them. That is what it is, if one-fiftieth of their insinuations are true as to the manufacturing of this case, sticking witnesses together to compare notes, and framing them. If one-fiftieth is true, take O'Dwyer, Turkus and the rest of us, tar and feather us, and run us out of town on a rail, and put us in jail. That is where we belong—not here representing the People of the State of New York. Think of it, gentlemen. It is monstrous—that kind of “atmosphere”. A hopeless case—if they did not know it when they got their retainer, there is no lawyer in the court room that does not know it, when all of the evidence was in, that there are three guilty men at this Bar of justice. They accuse the District Attorney of a frame-up and when the case does not dove-tail on the point they yell: “Ah, it is subornation of perjury!” But one of them exploded a theory—one man is in jail in the Bronx and the others are in a hotel, so they did not get together.

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The Court: You must not discuss what you think or believe, or what anybody else in the court room thinks or believes. The jury will disregard about what other lawyers think.

Mr. Turkus (Continuing): They said to you, in substance, gentlemen, when the case did not hinge—a five year old murder—when it did not dove-tail minutely, point by point, that it was a case of subornation of perjury which was not done properly. That was an unanswerable inference to their argument. That is what they try to

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throw as a "smoke screen"—put the District Attorney's office on trial. Let the jury forget that Lepke, Capone and Weiss are on trial. Anything to confound, confuse, create "atmosphere"—not to ball up twelve—they are too smart for that—one or two—get them fighting.

Now, let us continue. I said, "In May, 1940, something did happen. The case was broken from the inside. Then on May 28, 1940, the Grand Jury of Kings County handed down an indictment for murder in the first degree against these defendants, Buchalter, Weiss and Capone, together with others, for the murder of Joseph Rosen." True?

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"The indictment duly found by the Grand Jury reads:

'County Court of the County of Kings.

'The People of the State of New York,
Plaintiffs,
against

Louis Buchalter, alias 'Lepke', Emanuel Weiss,
alias 'Mendy Weiss', Harry Strauss, alias 'Pitts-
burgh Phil', James Feraco, Philip Cohen, alias
'Little Farvel', Louis Capone,

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Defendants.

'The Grand Jury of the County of Kings by this indictment accuse the defendants of the crime of murder in the first degree, committed as follows:

'The defendants on or about September 13, 1936, in the County of Kings, wilfully, feloni-

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ously and of malice aforethought, shot and killed Joseph Rosen, with revolvers.

William O'Dwyer,
District Attorney.

'A true bill.

John B. Malone,
Foreman.'

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"The defendant Harry Strauss, alias 'Pittsburgh Phil', is no longer alive. Insofar as the defendants Philip Cohen, alias 'Little Farvel', and James Feraco, are concerned, the indictment against them has been severed by this Court, which means they will not be tried together with these defendants at the Bar."

A "severance", the Court will charge you, is something concerning which the jury exhibits no concern.

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Then I said, "The testimony to be given in open court will show you what the Rosen killing is all about." And now, let us talk about that; let us talk about Sholem Bernstein. Now, there has been a great "smoke screen" put about Sholem Bernstein. To begin with, did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody show you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed? After five days of cross-examination by highly touted, capable lawyers, did they shake him on one material fact in connection with the Rosen murder? Let me show you that they did not. Now, the significance of Sholem Bernstein is not

so much through the standpoint of jury proof, it is from the standpoint of investigation, and I will show you why. The Rosen murder, on January 1, 1940, was a challenge to Judge O'Dwyer and the entire office, as it would be to any decent public prosecutor. Do you remember Sholem Bernstein's testimony, how the District Attorney and the police swept down onto the Brownsville and East New York area of Brooklyn, and that people went to the four winds, including Sholem? How he went south—how he went west—how he went from here to there—until finally he came and gave himself up? Do you think that there was police activity here? Do you think that when the investigation went on Judge O'Dwyer sat down, and out of seven million people in New York City, or out of twelve million people in New York State, he selected Lepke, Capone and Weiss for a witch hunt? Is that a "smoke screen", too? Is that "atmosphere"?

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Now, let us go back to Sholem. Sholem, on April 12, 1940, was arrested, and shortly thereafter he "talked". On May 20, 1940, he was taken before the Grand Jury investigating the Rosen murder—a Grand Jury conducted under the auspices of Judge O'Dwyer. Now, from the standpoint of investigation, we are now beginning to get somewhere. Did you see, when defense lawyers got the Sholem Bernstein Grand Jury minutes, what happened? They asked him four or five questions and dropped him like a red hot stove, because an inference is inescapable that, just like Sholem Bernstein said, on May 20th of 1940, when he went before the Grand

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Jury, he told his story just as he told it to you. Four or five insignificant questions on cross and they dropped him like a red hot stove. Oh, sure, keep on the "fringes" of Sholem Bernstein's testimony—make him out to be a car thief—make him out to be a shylock. Did I paint him out as an angelic character? I did not. Didn't I submit him to you in his true light? Did you expect the chauffeur of the Rosen murder—their associate—to be a pious gentleman who goes to his synagogue every Saturday? Oh, they kept on the "fringes". Let me show you about Sholem's significance there. Now, when you have the chauffeur of a murder car under investigation, do you see what that adds up to? Now, you know that Sholem Bernstein stole the car, stole the plates, put the car in a garage for safe-keeping, how they met in Lincoln Park—how they watched the victim the Saturday night before the murder—how they developed the plot in the hallway of the apartment. One witness said, "Until the 'rat' came out," referring to the victim. How they followed him to his little candy store—how they riddled him with bullets—how they made their getaway—where they abandoned the car—who picked him up at the other end. Now, you have there only an accomplice, but you are getting somewhere in the Rosen murder investigation when Sholem opens up. Ah, then, you are getting somewhere, but you certainly are not getting anywhere with the men behind the scene—not yet, not yet. What do they do on cross-examination? "You wrote letters from the Half Moon Hotel?" He said, "I did not." Well, they had photostatic copies

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of letters. You can imagine who Sholem wrote to when they had photostatic copies of letters. Nobody said he was an angel. If he were sweet, angelic creature, he would not have been useful to them. What did they need him for? Have they got any use for you? Do they come to your house? Do they have any business with you? Of course, not. It is with the Sholem Bernsteins, and such tools—the men who have dipped their fingers in crime, who like the feel of easy money. They are useful to them—not you. Well, he wrote letters. What is that, to get the jury all confused—that he lied when he said he did not write letters? And to add it all up, suppose he did write letters? He did write them, suppose he had told you? No harm in that. Even in Sing Sing Prison, where you are a convict, you can write letters. What is wrong about that? Sholem, this misguided man, wanted to protect some employe in the hotel, and he denied it until they brought here the photostatic copies of letters. Then he had to admit it. Ah, said defense lawyers, denying the truth of such things, destroys his credibility beyond all doubt. Then they have another plea to destroy his credibility: “Didn’t you go up to the mountains—weren’t you sworn under oath?” I conceded, for the purpose of saving time, that the testimony up in the mountains, if given by the stenographer up there, would be the same as it was read.

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Now, let us talk about the mountains. “He raised his hand up to Almighty God and testified falsely.” Did he testify falsely to one single sentence against Gangi Cohen up in the moun-

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tains. Not on your life. Even Mr. Rosenthal, the canniest, the wiliest of lawyers, admitted that. "And he told lies about himself," said Rosenthal. He went up to the mountains and gave three pages of direct testimony. Who was the lawyer up in the mountains who cross-examined Sholem Bernstein? The lawyer for Gangi Cohen—the lawyer who on March 26, 1940, before Sholem gave himself up had advised Tannenbaum to stand on his constitutional rights when Tannenbaum was picked up and brought to the District Attorney's office—the same lawyer, who by coincidence, later became the lawyer for Little Farvel Cohen, a defendant in the Rosen murder. That is the lawyer who cross-examined for seventy-five pages to try and create any doubt about Sholem's three pages of testimony against Gangi Cohen. Not on your life. It was a fishing expedition. Now, watch. He has got to go to Sullivan County. Sholem was sent to cooperate with a lot of enforcement agents there. He was told to discuss only, according to his testimony, only the murder up there—nothing else. Is the District Attorney justified in trying to prevent leaks about other matters when, as Sholem Bernstein says, and as the evidence in the case proves, at the very time when he was up there testifying, one of the fugitives was in Kansas City, Missouri, in flight—one of the fugitives in this Rosen murder? Unfortunately, there was no Assistant District Attorney in the court room from Brooklyn when that went on, because we would have stopped it up there, because, obviously, Sholem Bernstein, and I am not trying to condone a falsehood

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under oath—you cannot condone that, and nobody can—I do not do it—I do not condone it—but I am showing you an explanation of that kind of testimony as he gave it from the stand and the reasonableness of it. He thought—with the situation as he knew it—with the fugitives out—of the necessity of secrecy in the progress of the investigation, that he would disclaim knowledge of something he had already testified to in detail before the Grand Jury in Brooklyn one month before he went to the mountains.

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Now, whether he was right or wrong—and I admit he was wrong in doing it—that was his explanation. And you can see it was reasonable for that kind of a mind, because as long as Sholem Bernstein was to give one word of testimony in the mountains, it would expose him to the purge of cross-examination about anything and everything under the sun in which he was in, no matter how many investigations were going on. He should have told the truth—there is no question about that. But this is all the “fringe”. Has there been one lawyer in the five days of cross-examination who was able to even get you doubting as to the stolen car, who stole the plates, who did the “casing”—he said he was innocent of the murder. And doesn't the rest of the proof show that Capone and Mendy Weiss were the ones with him?

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Now, let us go back a minute. This “architect” that somebody spoke about. He meant subornation of perjury, not architecture. “Rubin,” he said, “Ah, he is a two-timer—this is the second time he has testified against Lepke.” But

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the proof shows that Rubin is Lepke's nemesis, inescapably, inescapably—Rubin.

The Court: I think at this point we will give the jury a five minutes recess. Gentlemen, return in five minutes. Remember the admonition. The court room will remain in order.

(Jury returned to court room after a short recess and summation continued.)

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Mr. Turkus (Continuing): At the point of recess I got to where we were discussing the breaking of the case from within, and I told you about the break that came when Sholem gave himself up. There came a break before that. The "break" before that was Max Rubin. You remember the testimony of Rubin, not only brought out on direct, but brought out with a great deal of force and effort by defense counsel on cross-examination, because they read from the very record that was then made by William W. Kleinman, who was then Lepke's lawyer in that case.

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The Court: That is not in the record, is it?

Mr. Turkus: It is, it has been read in.

The Court: All right, proceed.

Mr. Climenko: May I take exception to Mr. Turkus' answer?

Mr. Turkus (Continuing): If it is not in the testimony, gentlemen, throw it out. That is my recollection of it. If it is not, then you disregard it. And I say to you, with every degree of candor and fairness, if there is anything I say to you that differs from the way your understanding and common sense sees it, if it does not pertain to the issue, the single issue here, disregard it. It is your decision that counts,

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not my interpretation of the evidence, or anybody else's—it is yours. If there is anything I say that does not square up with the facts, throw it out of your mind entirely. With that understanding, I will continue.

You remember Rubin's testimony how shortly after the trial of Lepke, which was in February of 1940, he met Police Inspector McDermott, and through Police Inspector McDermott Rubin was brought to meet Judge O'Dwyer. That would make it, he said, I think, a month after the trial; that would make it in March of 1940 that Rubin had a talk with Judge O'Dwyer and another Assistant District Attorney by the name of Heffernan on that occasion, and that notes, memorandum notes, were taken by either Judge O'Dwyer or Assistant District Attorney Heffernan. That is a pretty good way to get secrecy. They talk about a "new system". What do you mean, a "new system"? Are you children? Is that the kind of business meant to confound or confuse one or two jurors, to think there is a doubt? Do you think we have to put information we gather on confidential investigations in the public press, or put it where there may be some prying fingers or some lurking eyes that may see it? Let us be sensible. We are dealing, when we investigate a Rosen murder, with men whose fingers are dipped in the blood of Rosen—whose very act shows they would stop at nothing. Do you think we used any discretion in being secretive with our investigation?

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Now, let us go back to March. The case then broke from within. They tell you Rubin is the "architect". Why, isn't his own testimony un-

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disputed on direct and cross? Rubin, after a few preliminary interviews in March of 1940, never came back to the District Attorney's office again until 1941. That is the "architect", who has engineered this. Judge O'Dwyer put in his record and background. Who do you think he is? A fool? Do you think he is going to permit witnesses to run his investigations, as one lawyer insinuated? Now, it is so significant on an investigation like this. They want to be shown how it was broken from the inside—as if they did not know. But since they raise it, let us say a little more. Do you see the significance of March, 1940? You remember Magoon. Now, we have Rubin in. Do you remember Magoon—do you remember Tannenbaum? Now, watch. In March of 1940 the defense lawyers themselves bring out from William W. Kleinman that Mendy Weiss was brought into the office of District Attorney O'Dwyer—March 28, 1940. They brought it out because Mr. Kleinman was a little hazy on memory on that point, but rebuttal detectives fixed the date as March 28, 1940, Rubin putting us on the right track. Mendy Weiss was brought in prematurely. That was a blunder, gentlemen, I am going to tell you right now—Mendy Weiss was brought in too fast—brought in only on suspicion—and Sholem had not opened up till April. Now it is March. So they take him in, and what happens? Look at this picture in the District Attorney's office. Here we are, January, 1940, Sholem Bernstein told you what went on in that office. Do you think we were sleeping during the days? Do you think every night we went to bed? You just use your head as to what

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went on in the District Attorney's office from January 1, 1940, when we saw a challenge like the Rosen case and other matters we wanted to investigate. What do you think was going on—a pink tea? Now, watch. March 28, 1940, I am in the District Attorney's office, and I will show you, going back to March, 1940, I am supposed to have some kind of a memorandum book when Kleinman was on the stand. I did not remember that Kleinman came to my office before Mendy Weiss. I did not remember that Kleinman was sitting in the office with me when he shook hands with Mendy, when Mendy was brought in, when he said, "I have been retained by your brother Murray, you know where to get me when you want me." And then he walked out. Kleinman did not remember, because Kleinman said he did not see Mendy Weiss in the District Attorney's office. That is something that happened in March of 1940, and we have a five year old murder that the witness is talking about now. If it doesn't fit like that (indicating), they lie; and if there are any material facts, irresistibly they fall back on the District Attorney suborning perjury.

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Now, let us go back to this investigation, as disclosed by the evidence. Here is Kleinman in my office even before Mendy Weiss arrives. Then Kleinman goes out and I am left with Mendy. You use your head as to how much I could get out of Mendy, because he was released March 28, 1940. That is a very significant factor from the standpoint of the investigation. Now, watch this: In March of 1940 Rubin was in the office. They tell you, "Isn't it a coinci-

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dence that Rubin and Tannenbaum remember the conversation in Lepke's office?" March 26, 1940, after Rubin, we bring in Allie Tannenbaum, and the record shows what happened. We sat him at the desk. To everything we asked him, "I refuse to answer on the ground it might tend to incriminate me; I have constitutional rights." March, 1940. And then Allie goes up to Sullivan County. His "constitutional rights" in Brooklyn step out for a while. But do you remember the testimony of Allie that the first or second Monday in May be opened up? Ah, now we are beginning to get somewhere. Allie opens up in May. Do you remember Magoon? We will talk about him a little later. Now comes the "break" from within. After Allie opens up, what happened to Mendy Weiss? Ah, look at this for "atmosphere". Mr. Police Commissioner Valentine is in a restaurant in April, they tell you, eating a steak, and Mendy Weiss came in with a lawyer. Ah, they want you to infer first that the Police Commissioner should know every wanted man in town. We did not want Mendy Weiss until after Allie opened. Then we had something. Then you have corroboration, which you will hear the Judge talk about—corroboration. You cannot convict on the uncorroborated testimony of an accomplice, even though they are telling the Gospel truth—you would be as helpless as a new born babe—you have got to have corroboration. Look at the inference. Do you think that Police Commissioner Valentine would suspect anybody who was having dinner with a lawyer in a public restaurant? Look at the inference

they want to bring forth and draw from that. But we do find this: That Mendy when he hears that Allie is going to open up, tells Berger, "I have got to 'lam'—I have got to duck—it looks like Allie is opening." Even jails have grapevines, gentlemen—things do get out sometimes. And what do we find with Mendy? Mendy hears that Allie has, or is about to "open". On June 6, 1940, he is established, by undisputable, documentary evidence—and you certainly can believe your own eyes—as being a new creature, a "James W. Bell," vice-president of the Chihuahua Tungsten Mines, with an operator's license from Colorado, with a phoney driving card. Oh, they get up here and they wrap the Star Spangled Banner around Lepke; they want to wrap a red sheet around Rubin—they want to take men who have served the United States Army to prejudice you—because they are on trial—to prejudice you against witnesses because they evaded military service. Where was Mendy Weiss in this emergency? In Kansas City, safe, with a phoney driving card. That is only to bring "atmosphere" in here.

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Now, when you are prepared to push a case you get an indictment and then you want to arraign defendants—that is your next move—that is common sense. We did not arraign Lepke in this until May, 1941, although it was a May, 1940, indictment. Processes had to be gone through. The indictment, which is an integral part of this case, shows the date of the arraignment before Judge Martin, where he stood mute and a plea of not guilty was entered for him. Mendy Weiss was not even caught until April 6, 1941. He cannot be arraigned before you

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catch him. And Judge Talley speaks about the Federal officers and all the officers that are here—about his having been apprehended by the United States Government. The due process of law requires his detention there and his production in court by them here when needed for trial. That is why there are other policemen here that he speaks of. And they talk of “atmosphere”. The defendants have been arraigned—arrangements having been made to arraign them in preparation for trial before that, which was the spring of 1941. The case is ready for trial. And then Mr. Rosenthal says, “Ah, Magoon—I will explode the theory.” They take him down from the Bronx; they give him chops; they give him steaks; and in January—between January and June of 1941—they get something out of Magoon. Gentlemen, we gave you everything we could give you in the case. It is true that some defendants leave themselves a little more open than others. Why, the evidence in his case shows you that, as cunning and as smart as was Lepke in New York, his cunning, shrewdness and trickery was equally matched by Louis Capone, of the combination in Brooklyn. I will show you how cute that man was—how he left a minimum opening—a minimum number of openings.

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Do you realize, gentlemen, that we have two of the men behind the scene, as well as the triggerman, in here? Men behind the scene—not actors who can be identified.

Now, let me go ahead with the opening, sentence by sentence, paragraph by paragraph, and don't let anybody tell you that any witness manufactured this case for us. You don't think the

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evidence walked into Judge O'Dwyer's hands, do you—a four years unsolved murder in 1940? Do you think that dropped as manna out of the Heavens into District Attorney O'Dwyer's hands? All right let us go on to the testimony, sentence by sentence, paragraph by paragraph, and see if I have not irresistibly established guilt beyond a reasonable doubt—irresistibly and logically. But before I do that, there is one point I do not want to pass on. The lawyers have told you of the great and grave responsibility. "Would you do business with these witnesses?" Of course, you would not do business with them any more than you would have them do business with you. One of them went so far as suggesting, "Suppose it was some member of your family who was on trial, would you believe them?" Well, members of your family, gentlemen, do not associate with them. Responsibility! I have a responsibility in this case—Judge O'Dwyer has a responsibility—the responsibility of a prosecutor to fearlessly, courageously and with honesty, to present all the evidence in the case. Your responsibility! Don't let anybody put on your shoulders what does not belong there. Your only responsibility is to decide the single issue of fact. Has guilt been proven beyond a reasonable doubt, or are Lepke, Weiss and Capone innocent? The Judge himself, in all the majesty of the law, garbed in the black robe of justice as he is, has no more responsibility with this case than doing his job of instructing the jury on the law, conducting the trial, and doing what the law says. Don't let anybody insidiously try to get you thinking about punishment. That is not your

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responsibility. It is their responsibility, for if they had not been three of the killers of Rosen, you would not have them sitting here. That is where the responsibility is—with them—and don't let anybody fool you on that.

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Quoting from the opening representation of facts: "In the days when Rosen was a partner in the clothing trucking business the defendant, Lepke, together with certain officials of the Amalgamated Clothing Workers of America, set out to run that industry, to their liking and benefit." True? They talk about "atmosphere", to bring in "unions". Why, you had the spectacle here of Lepke's lawyer saying to you that the situation between the unions and the gangsters was monstrous. He said that, to put it in for "atmosphere"? We only put in this case what the law of the land permitted, the association of Lepke with crooked union officials, and to show that Lepke and these crooked officials were like that (indicating). We did that because the law permits it on motive, and Judge Talley gets up here and tells you, admittedly in violation of the Canon of Ethics, "I hereby, in public court, advertise for a taxpayer to bring to a halt, to scuttle the O'Dwyer investigation," and to be a signal that he, a former Judge, has a right to scuttle, to sabotage, the investigation of a duly elected District Attorney of this county. "Atmosphere"—confound and confuse! Get one or two mixed up.

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Then Lepke's lawyer, "Ah, I know all about the other figures and racketeers who infested the unions. I am against them," he said. Gentlemen, this goes for me and for me alone—no in-

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sinuation or innuendo with reference to anyone else—any resemblance to anybody living or dead, purely coincidental. Whatever my lot in life may be, whether I go out of public office after this case or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way with any of you to make you feel that I had discredited you or myself, or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of a situation, I would like it. And that ends it.

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Mr. Barshay: I make objection to that most respectfully. That is giving testimony here from the floor as to what this gentleman would do in the future. It has nothing whatever to do with this case, or the issue in this case, and it is not based upon any record.

The Court: We will have no further interruption. That applies to Mr. Turkus and applies to all other counsel in the case. The rule will be impartially applied as to every counsel. The Court may interrupt and will, if it deems it proper. As to all other matters, you will be covered by your exceptions taken at the conclusion of the summation.

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Mr. Turkus (Continuing): "In the days when Rosen was a partner in the trucking business, the defendant, Lepke, together with certain officials of the Amalgamated Clothing Workers of America, set out to run that industry to their liking and benefit." Did they? Wasn't the most eloquent admission of that in the summation of

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Mr. Lepke's own counsel, that after Weinstein, Katz and Lepke, after prior negotiations which I do not have to go into, after the Hillman and Orlofsky situation—after the Lucky Luciano meeting—they sat down to run the industry, the clothing trucking, to their liking and benefit. True? Have you forgotten that, to the benefit of those crooked union officials, it was to their benefit to keep the trucking industry here in New York—not to let it go to Pennsylvania, and that Lepke said, "If the business goes out of town," he could not make a dime. Can you forget that day after day of testimony, how it was shown that the stoppage was done by crooked union officials and Lepke operating as one—each one hand in glove with the other? What more of a confession of guilt would you want than the summation of his own lawyer in that regard?

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"To effectuate this, Rosen was one of the clothing truckers who had to be dealt with and who, as I have already stated, ultimately wound up running a penny candy store." What is the difference whether the New York and New Jersey had a lucrative business or whether it was just another business concern. Through the lips of Sobler, produced by the defense, you see, complete corroboration that Rosen was a man of vision—never mind him being a chiseler—at least, he had this much vision, that if you operate in Pennsylvania you get away from the racketeers in New York, who were operating then, and it was brought out by one of his own lawyers, even after Mr. Dewey took office. Did you hear what Sobler, brought by the defense,

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said about the Pennsylvania business? The New York and New Jersey business was fine—that was the cream of the business; the Pennsylvania was not doing so good, but doing good enough—doing good enough to worry the Weinsteins and the Katzes and the Lepkes that there was something in the wind; that the New York manufacturers were sick of paying tribute; that Pennsylvania was a field of production to honest American labor and industry—a way out to save the enslavement of American laboring industry. They talk about taxpayers' money—every suit you had on your back was part of that—the enslavement of American industry and labor. Why, they provided complete corroboration of the motive, with their own witness. Sure, Rosen had to be dealt with. If he had money in the business, if he had trucks, Rosen would not have made a fight, not against him (indicating). But what stood behind him? All Rosen had was his two hands and vision—Pennsylvania. That is why he fought. That is why he was dealt with in the Broadway Central Hotel. That is why at the meeting books were produced, with Lepke in the background, Gurrah at the desk, and Rubin and Fields. That is why he was given a job as foreman with Louis Cooper. Not any public benefaction on the part of Mr. Lepke. What are we, children? Didn't he wind up ultimately in a penny candy store?

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Again, the representations on the opening of the prosecutor: "Rosen, however, was bitter. He complained endlessly against Lepke for his plight. When the Dewey investigation got under way Rosen threatened to get even." Didn't he?

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Didn't he complain? Didn't they have to send people down from the local of the truck drivers' union to patronize the store? Didn't he threaten to get even, to go to Dewey? You could have a seven year old child sum this case up to a court and a jury. The case, gentlemen, is a power house, a power house of proof, and there is no person in the court room that is not cognizant of it.*

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"To keep Rosen's mouth shut, it was the defendant Lepke who ordered Rosen to get out of town and stay out until the Dewey investigation blew over. Max Rubin, the business agent of Local 240 of the Clothing, Drivers and Helpers Union, and a trusted aide of the defendant Lepke, was sent by Lepke to do this job. It was Max Rubin who delivered Lepke's message and the \$200. to Joseph Rosen. It was at Lepke's orders that Rosen left town, but, as you now know, Rosen came back." True? Didn't Max Rubin come down there with \$200.? Didn't he deliver the message? Didn't Rosen go to Reading, Pennsylvania? Ah, watch this maneuver of clever defense lawyers. When I brought out that Harold Rosen were visited by Mr. Cuff and Mr. Barshay, do you think I imputed any base motive to a lawyer interviewing the son of the victim of one of the most vicious and brutal murders I ever heard of? Of course, not. They visited Harold Rosen a year ago. I made a mistake. Do you think they would have gone down there if they thought the testimony of Harold Rosen as to the meeting in the Broadway Central Hotel and the pantomime there connected, and the visit of Lepke, and the visit of Lepke

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with the limousine in their place when the father went with him the second time—this visit was significant. Do you think, as Mr. Barshay called him, the venerable Mr. Cuff, for whom I personally have the greatest respect, would have gone with Mr. Barshay down to Reading, Pennsylvania, if there was not something about Harold's testimony that was vital? That is the purpose of bringing that out. Don't let us have any "atmosphere" about that. "The Dewey investigation was under way". It certainly was. Ah, ha, somebody says, Lepke—the smart Lepke—with the Dewey investigation under way, with cops around, do you think he would continue? Why, that was from the lawyer who brought out from Rubin that the flour racket was going on right while Dewey was investigating. Do you think the investigation did any more than hamper Mr. Lepke for a while? His lawyer says—"He calls him 'Lepke' ". I call him "Lepke"! Why, he was called "Lepke", gentlemen, when I went to public school. That is what his associates called him, "Lepke". Once he was "Murphy", on the telephone, and his partner was "Callahan". What did he want us to do, call him "Murphy", or "Lepke"? I call him as his associates call him, "Lepke". That, they say, is "atmosphere".

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Continuing with the opening: "The Dewey investigation was under way. Word that Rosen was back and again threatening to tell all that he knew, reached Lepke. Then it was that Lepke ordered the execution of Joseph Rosen; the murder to have a double-barreled effect; an object example to all others who might dare to

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talk; and to forever end Rosen's threat to go to Dewey." Was that proven? What was the first thing that Lepke wanted to know from Paul Berger after the murder of Rosen? "How did they take it in the market?" The report was they were scared to death—even Weinstein and Katz would not go to meet Lepke in the Hotel Governor Clinton any more at that time. That was the effect in the market. 1940 was the time of the Dewey talk. That incident was in September, 1936. Figure it out for yourselves. Were people scared? Did that have a double-barreled effect? Did word reach Lepke? You heard Rubin, Rubin who was not an accomplice, as a matter of law—you heard what he said, corroborated by Tannenbaum, who in this case is not an accomplice, as a matter of law. And I will talk about Tannenbaum later. Has that been proven beyond a reasonable doubt? Now, here is where we get the logic of the defense lawyers. From the opening, I quote: "Even moved with rapidity. Weiss was assigned to handle the details by Lepke; Lepke personally furnished Weiss with the man to 'finger' Rosen." And, Judge Talley: "A little candy store, why did they have to 'finger' Rosen in a little candy store? Why, he could be the only man behind the counter in a little candy store," says Mr. Talley. A "little place"—look at the photograph, look at the diagram, and see how little it was. "Who needed to 'finger' Rosen?" This murder, gentlemen, was to seal the lips of Rosen and to have a double-barreled effect by frightening all the witnesses in the market. Did you ever hear of a wrong man being killed? That is why he is

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"fingered" by somebody who knows him, so that there will not be any mistake on the part of the employe. That is why Lepke, personally, personally, took the "finger" to Mendy Weiss, so there would be no mistake. And, believe me, gentlemen, the evidence shows there was none. They "hit" the right man. Now, you know what "hit" means, by now.

I will continue with the opening: "Lepke personally furnishing Weiss with the man to 'finger' the victim, that is, to point out the victim to Weiss. Capone, 'Pittsburgh Phil' Strauss, Feraco and 'Farvel' Cohen went to work with Weiss. 'Sholem' Bernstein was brought in. The conspirators made their plans. The preliminary details, namely, the theft of the murder car and plates and a 'drop', or garage for its concealment until needed, were properly attended to." Now, watch this—One of the defendant's lawyers, if not two, says, "Look at this fatal flaw in the People's case," and they dig a hole in the People's case. Do you remember he said to you that Berger 'fingered' Rosen to Weiss late on Friday night. Do you remember from the testimony that plans to steal a car were under way before the 'fingering'? Thus, they argue, inescapably, the logical conclusion that somebody is lying. Ridiculous—ridiculous. Look at it: Lepke on the fatal Friday, September 11, 1936, that usual soft-spoken Lepke, raised his voice, even his face was flushed, when he spoke to Rubin. He had his mind made up when he spoke to Rubin that Rosen had to go. That was the tenor of his statement to Rubin. And when Rubin—and I do not say that Rubin

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is any angelic creature—he has lived on the sweat and toil of others—I don't paint him as any angel—but he was the perfect tool, the perfect man for Lepke; outwardly he looks good, talks well, is well-mannered, but had larceny in his heart—a perfect tool for Lepke. But Rubin does not go in for murder, that is too much for Rubin, and Lepke knew it. So when Rubin wanted to run to Weinstein and Katz to try to straighten the thing out by getting Rosen out of the picture, Lepke let him go ahead; but Lepke had his mind made up right then and there that Rosen was “going”.

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Is there any such thing as organized crime—Lepke having a messenger go down and give word that a car would be needed before the “fingering” was done, and getting that under way? Let us be sensible, gentlemen. Can an American jury be “finagled” with that kind of logic, the timing is not right? Preliminary details could be—someone could be sent to Brownsville and arrange for the car before the actual

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“fingering”. What flaw in the People's case is that? What kind of logic is that? You could even do that on the 'phone, and say, “Get a car right away.” Somebody says Dewey's detectives and police surrounded the whole place. If there had been that kind of surveillance of Lepke, they would have caught him—I don't mean that—I mean the law enforcement would have caught them red-handed, the whole bunch of them. Oh, yes, they talk, they say, “Tannenbaum is no good, Berger is no good, Magoon is no good, Bernstein is no good.” They say because you convict the “finger man”, Berger, and

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the chauffeur, Bernstein, let those three out—that is logic—that is their logic. If you cannot get the tools, Bernstein, the tool, the chauffeur, and Berger, the “finger man”, if you cannot get them, their logic is you have them stuck in hotels, acquit the three killers of Rosen. I would love to convict the whole caboodle of them—I would like to have every one of them at the defense table who had their fingers dipped in Rosen’s blood, but you cannot do it, gentlemen, you have to break from within, you have to open somebody up—otherwise the District Attorney would have an unsolved murder right as I talk to you now.

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They talk to you about the taxpayers’ money. What is there concerning the taxpayers’ money? One of the lawyers inferentially let it slip out of his mouth that Bernstein should have been cut up long ago. That was his thought—that was Capone’s thought. Sure, if you had Bernstein cut up, you would have gotten no where near to Capone, who surely hid in the background. And he talked about him as the “come-on”. Sure—electrocute the witnesses, the tools—that would make O’Dwyer a great District Attorney, according to them. Take Sholem Bernstein, take Berger, get their admissions of guilt, and put them in the electric chair. That is great prosecution for which the taxpayers should give hosannahs to O’Dwyer, so that those three could get out. “Kill all the witnesses,” so the three big shots can get out—that is logic.

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Then, Judge Talley, of Manhattan, threatened to undertake a taxpayers’ action. Don’t you worry about the taxpayers’ money. The Court has supervision of the holding of witnesses.

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Don't you worry as to what is going to happen to the witnesses in this case. Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the Court and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke,

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Weiss and Capone would want. Let us use common sense here. What kind of rubbish is being handed out to you? "We will have to get one or two—not all—one or two, a little confused." The victim was "fingered" to Weiss. Capone schooled Bernstein as to the route to be used for the getaway, driving Bernstein, who was to be the "wheelman", or the driver, all over the route, again and again, until Bernstein knew it by heart from beginning to end—the end being the place of the abandonment of the car at the railroad bridge. Oh, he talked about the association of Capone. Why, didn't you hear in the testimony, when Sholem Bernstein spoke to Capone, he called him "Sir"? When Magoon described the combination in Brooklyn, he described Capone as his "boss". Talk about association! Forty pages of testimony out of three thousand—they take a million words from this record and they go through it with a microscope and get a couple of inconsistencies, and try to trip up a witness.

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Then came one lawyer—the great detective—only forty pages of testimony. Well, those forty pages of testimony show that Capone was a cowardly, shrewd, conniving, individual, who hid

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pretty safely behind the scenes and left very little to nail him. He did not have the physical courage of the loathsome character like Weiss, who at least pulled the trigger and took his chances with Cappadora, or any policeman who may have come down to block him. Talk about Capone—your responsibility to him in this case! Why let me show you how cunning was this Capone in this Rosen case, as disclosed by the evidence. His lawyer said he did not hang around Sutter Avenue. You can bet your bottom dollar he did not. When he drove around there, it was not in his car—it was in Bernstein's car. The murder was in preparation and he even kept Bernstein's car with him. I will show you the significance of that. This director, behind the scenes—this director, behind the scenes, picking an appropriate spot for the abandonment of the getaway car. Did he leave any opening other than being with Bernstein on Sutter Avenue? So what? If Capone had been seen riding on Sutter Avenue with Bernstein—so what? Does that put the director behind the scenes in the Rosen murder? Have you forgotten the preliminaries here when Mr. Rosenthal said, "The fact that Capone may know some of these People's witnesses, may have associated with them, are you going to hold that against him?" No, you don't hold it against him unless he was associating with them so that his fingers were dipped in the blood of Rosen along with the others. Then you hold it against him. That is your sworn duty to do so then—but not for just holding social intercourse with them.

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Continuing: "The stage having thus been set,

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the conspirators set out to kill their victim. Briefly."—and then I say parenthetically, "For the details will be given you in the testimony—the victim was followed from his home to the little candy store that Sunday morning, September 13, 1936." And let me show you, then I proved more than that—far more. Have you forgotten "Lincoln Park"? Have you forgotten Ardy's candy store on the corner? And have you forgotten that twice Mendy Weiss went over to look things over, as testified to by Bernstein, to see if it was all right to "take" Rosen Saturday night. Have you forgotten Cappadora's testimony that, on his way to work, around ten o'clock, or thereabouts, he stopped at Rosen's candy store for cigarettes? Maybe—I should not say "maybe"—but see if there is an connection with that and the return of Mendy Weiss, that it was not wise to go ahead; that there were people around Ardy's who might "make" them—identify them. From Sholem Bernstein's testimony you figure out who was the man who prowled around in the Rosen candy store September 12, 1936. You see, they leave Lincoln Park and they go to Farvel Cohen's apartment—scheming, conniving, planning how to cut down a man with a hail of bullets. And when they got there, they were eating—mind you, they were eating. They gave Bernstein a sandwich—

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The Court: That reminds me; we had better take lunch now and resume promptly at 1:30. Gentlemen of the jury, please do not discuss the case, let no one speak to you about it; keep your minds open; remember the previous admonitions. The court room will remain in order. Let the

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jury first go out. The defendants are now remanded.

(Recess was thereupon taken until 1:30 P. M.)

(AFTERNOON SESSION. TRIAL RESUMED.)

(Mr. Turkus continues his closing address, as follows:)

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Mr. Turkus: Continuing with the factual discussion in my opening statement, a representation of the proof: "Briefly, the victim was followed from his home to the little candy store that Sunday morning, September 13, 1936. Pursuant to plan and agreement, Weiss and Strauss entered for the 'kill'. Armed with a loaded gun, Feraco stood outside as the 'lookout'. Bernstein sat at the wheel of the getaway car, motor running. Weiss and Strauss pumped shot after shot into Rosen. They made sure he would never reach Dewey's office." They made an object lesson of Rosen—a death burial certificate. "Into the waiting getaway car they piled. Weiss and Strauss gave instructions, but Bernstein adhered to the route that Capone had drilled into him the day before. The car, as planned, came to a halt at the railroad bridge, where it was abandoned. Out stepped the four, Weiss, Strauss, Feraco and Bernstein. Past the newsstand, up the stairs, and over the bridge across the tracks to the Junius Street side they walked, to keep their rendezvous with Capone and Farvel Cohen." One of the defense lawyers says, "How

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did Capone know to be on the Junius Street side?" Well, Bernstein didn't hear that—they sent him away Saturday night to put the car in a "drop". Where was the flaw in that? Was he told? That is proven by the fact that he was there. And while Weiss and Strauss were pumping shot after shot into Rosen, where was the "behind the scenes director, Capone"? Just where you would expect a cute, cunning boss—fourteen or fifteen blocks away. And where was Lepke? Not at the scene—I should say not. And they tell you, gentlemen, Capone was in Bernstein's car on the Junius Street side—not Capone's car—so that if anybody got the license number, it is Bernstein that gets the rap as an accomplice. An accomplice without corroboration is not worth a nickel. Does that show the cunning, shrewd Louis Capone, who is called "Sir" by his employees? Capone has no alias, says the lawyer—that is too bad, Capone not to have an alias. If this case was not broken from the inside, Capone never would have been exposed either to you or to the rest of the world.

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Suppose there had been pursuit by the police with Mr. Capone in Bernstein's car, waiting on the Junius Street side of the bridge? Think that over a minute—would he have waited for them?

Continuing: "There, in wait, were Capone and Cohen—with two automobiles." Lying in wait, protected by Bernstein's car. "Weiss passed his gun to one of his confederates, for destruction." He did, and the gun was destroyed. "The killers separated—Weiss, Capone, Strauss, and Farvel Cohen fleeing in one of the waiting cars in one direction." And

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there again is the cute Capone—no longer in Bernstein's car—a different car, a legitimate car. "While Feraco and Bernstein fled in the second car in a different direction." Now, Bernstein is in his own car. "Weiss' gun was destroyed." You heard the testimony. "The second gun was flung into the lot, where it was subsequently discovered." I have no witness who saw it thrown in the lot, but the unmistakable and inescapable conclusion is since that was one of the murder guns, it was flung in the lot, because the gun that was found in the lot checks up by ballistics as one of the guns that pumped bullets into Rosen. A conclusion—irresistible. "The murder having been successfully completed, Weiss duly made his report to Lepke." After making the report and getting a pat on the back, somebody tells you, "Ha, would Weiss be fool enough," they say, "to talk to Tannenbaum about the part he played?" Tannenbaum was not there to play tiddlewinks—Tannenbaum was there on business. He was there on business in Lepke's office. Weiss even told the Federal agents who picked him up in Kansas City, Missouri, that he would have gone back to Brooklyn when O'Dwyer was out of office. Well, if he talked like that before the Federal agents, how do you think he would talk to Tannenbaum? Do you think those boys held any secrets from each other?

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"Lepke set out to insure—" Still quoting from the opening, and we are taking sentence by sentence and paragraph by paragraph—"Lepke set out to insure that there would be no arrest and prosecution in the Rosen case—no arrest

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and prosecution of himself and his accomplices. Lepke maintained contact with the movements and happenings in the Rosen investigation. To thwart and frustrate all investigations, Lepke sent witnesses out of the jurisdiction, keeping some out—permitting others to be questioned when he was satisfied that it was safe to do so.” Have you forgotten that he sent Mendy out? Mendy might be “made” in front of that store. Mendy is a big, husky fellow, whom you might not be able to miss. Maybe Mendy was “made” by the boy at the newsstand. But he thinks he is not “in”—the shrewd Lepke—Shimmy Sales who was not even in the murder—and Little Farvel, who was with Capone fourteen blocks away on the other side of the railroad bridge. Who could identify Capone and Little Farvel in the Rosen case? Oh, no, he did not want Mendy “in”—I should say not, “Lepke soon decided” quoting from the opening, “investigations must collapse if witnesses are not available.” In line with that decision, he ordered Rubin to leave town. Is there a single man in this court room who disputes that? Oh, you have the same mental juggler—“What would he leave town for?” If a witness knows of two things, he is sent out of town—he is sent out of town on both. And if there is any doubt about accepting Rubin’s word for it, the cleanest witness in the whole case, Maguire, admitted to the United States Supreme Court of America to practice, a labor lawyer of refinement, and culture, and respect, and decency—you can see that from his very demeanor—and what does the counsel for Lepke bring out? That before Lepke

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went to Maguire's office Rubin consulted Maguire about leaving town on both matters, the Rosen and the Dewey. That we could not bring out, because that conversation was not admissible against the defendant. But by cross-examination it was opened up by Lepke's counsel. Do you believe Maguire when he says that Lepke said, "If witnesses are not available, investigations must collapse." Why, the very killing of Rosen, the very murder of Rosen, is concrete proof of that philosophy. A move to frighten off others at the same time. Concrete proof of the philosophy of Lepke.

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Continuing: "At Lepke's insistence and direction, Rubin was at times hidden and concealed in the City of New York and at other times shuttled from city to city, throughout the nation. This continued until Rubin could no longer stand the continuous flight and concealment. Contrary to Lepke's order he, too, came back to New York City, to stay." Is there any doubt in anybody's mind about that having been proven?

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Somebody talked to you about money. Do you remember those checks I picked out of the check book and had marked in evidence here? The very union that Rubin was business agent for. Do you think that Rubin could have been out on the "lam" and collecting money as business agent for services not rendered unless he and Lepke were that close (indicating): unless, as the proof and evidence indicate, Rubin was then his trusted lieutenant? Have you any doubt about that? And think of Mr. Barshay's summation when he described Lepke's activities in

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Manhattan. Three days after Max Rubin testified, this is quoting right out of the opening, before the Grand Jury in New York County—and mind you, gentlemen, Grand Jury proceedings are secret—and this was a Grand Jury in Manhattan under the auspices of Mr. Dewey and the Court of General Sessions—a bullet was fired into the back of his head which emerged at the bridge of the nose, in close proximity to his eye. Did Rubin roll in the gutter with a bullet in his head? Weren't his nerves and speech affected, his head crooked—on one side, permanently? Is there any doubt about it?

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Continuing: “This shooting was directed and planned by the defendant Mendy Weiss, who had learned that Rubin was ‘talking’.” Is there any doubt about that from the testimony in this case—how Rubin was “cased”—how he was followed from his place of business, stood up in Child's Restaurant, and run down as if he was a dog, and injured permanently? That is what they did with Rubin. Hunted him down, tracked him down, set him up in a restaurant.

Continuing from the opening: “Miraculously, however, Rubin was more fortunate than Rosen.” Wasn't he? He lived. “Unlike Rosen, Rubin's lips were not sealed. Rubin survived, and will testify at this trial,” I told you, “the trial for the murder of Rosen,” and didn't he? Wasn't it a miracle? A bullet from the back of the head, out of the eye—thirty-eight days in the hospital. Wasn't it miraculous that he lived? Yes. But his lips were not sealed.

And then I said, in conclusion, in my opening statement: “Mr. Foreman and gentlemen of the

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jury: The proof that you are about to receive in this court of justice will establish to your satisfaction, beyond all doubt, that these defendants, Louis Buchalter, alias "Lepke," Emanuel Weiss, alias "Mendy Weiss", and Louis Capone, in combination are three of the killers of Joseph Rosen." And didn't I? And I concluded the opening representation of proof of evidence: "For the People of the State of New York, the interests of justice will require a verdict of guilty as charged—guilty of murder in the first degree."

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There I have taken you, sentence by sentence, word by word, and paragraph by paragraph, of that opening statement to you, and I have not only proved every word of it, but more—but more: Flight on the part of Mendy Weiss, spoliation of evidence on the part of Mendy Weiss, attempted spoliation of evidence on the part of Capone. These are the things which I represented to the jury would be established in my representation of proof, and those matters were established.

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Let me show you how canny this whole situation has been arranged. One lawyer got up and he said, "Our defense"—What a true word he said, "Our defense". Those three were together, irrevocably interwoven. They talk about "atmosphere". Because one counsel sits at one table and the other at another table, is that a separation of these three? Let me show you how each one of the defenses were put in, and then you can consider the summation of Mr. Rosenthal in the wind-up and see if he did not pay back for what Lepke and Mendy did for Capone in the

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defense. Now, watch this: To start with, there is no obligation on the part of any defendant to interpose any defense, not at all. The burden of proof rests exclusively upon the District Attorney. But Lepke started a defense—let me show you what I mean—the three interlinked and interwoven in the Rosen murder, as the evidence shows. Sobler—there is a fine one for you. Instead of being outraged by the violent death of his partner, he visits, in June or July, 1940, the lawyer's office on Broadway and 35th Street—the lawyer is still unidentified in the record—and he says the next time he went to his office it was on Wall Street, and at that time it slipped out of his mouth, "but not under orders." The first time, Philly Carver, sometimes known as Buchalter, took him there. When the District Attorney, in proper investigation and conduct of the murder of his own partner, sends down a detective—I brought him into court here for you to see—my personal aide in this investigation—Detective Frank Gray—and out of the lips of that Sobler came about "kidnapping me". Sobler was compelled to admit that Gray stood by while thousands of dollars, hundreds of thousands, I think it went past a hundred thousand dollars worth of merchandise, was loaded in the Svirsky Clothing; and when Sobler said, "My heart is not good, I cannot ride in the subway," Gray took him to the District Attorney's office by taxicab and paid the bill. When he got to the District Attorney's office he was questioned and sent home in an automobile, taken in privacy and afforded security, to his own home, where he put on his own glasses, and in the presence of his brother-

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in-law, Sam Richter, read every single word of the statement, made corrections, and then signed every page, and swore to it. And that is the outraged partner who tells you that the District Attorney "kidnapped" him.

Now, let us see the significance of Sobler. You see, if Sobler in this case were believed by the jury, the three defendants are "out", because if Sobler had been believed, there would have been no motive, and if Lepke had no motive—you see, if the Pennsylvania business thing was knocked out, if there was nothing to take away from Rosen, if there was no reason that he had to be dealt with, there could be no motive. If Lepke had no motive to kill Rosen, Capone had no reason or motive to direct the murder behind the scenes, and Mendy Weiss had no reason for firing a shot. Destroy the motive and the three are "out". And what did happen to Sobler? They talk about lying witnesses! That man jumped off the stand, he started to walk out of the place. I took him line by line, paragraph by paragraph, of his own affidavit made in the sanctity and safety of his own home, and then he categorically admitted it. If they could have done a job like that on any of the People's witnesses in the case, I would like to see it. The difference was that Sobler told the truth on cross-examination when he was compelled to tell the truth.

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Now, let us see the next character they bring in, and if you believe him, the three defendants are "out". Now, the technique—watch this one. Here is what I call the three card Monte—Carl Shapiro—now you see it, now you don't. Checks,

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here, there, everywhere. \$132. payroll in New York—he has a relative in the business. He can sign checks for the \$9,000. payroll in Baltimore. That is intrusted to strangers. But the defense lawyer gets up and says, “What did the Raleigh have to do with the case?” Greenberg and Shapiro was the hangout for the mob. Greenberg and Shapiro became the Raleigh, and at the Raleigh, the mob went there when required on business. That is the inescapable inference from the testimony. Not to hang out

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and look at Greenberg and Shapiro, but to the Raleigh when required by business—at the smaller office which could not be glutted up, but when required by business they were there. What has the Raleigh got to do with it? It was right in the Raleigh office that the murder order was given by Lepke. It was in the Raleigh office that the \$100,000. a year dividend—\$40,000. to Mrs. Lepke and to Mrs. Gurrah, and to somebody else. What has the Raleigh got to do with it? Well, figure it out. What has the Raleigh

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got to do with it, when an order, right in the Raleigh office, is given, when Berger is sent for, when he leaves, Lepke with Berger, to meet Weiss to “finger” the victim? What has the Raleigh got to do with the case? Did he come here with any diary or any office record? He came here with cancelled bank checks, and if you look at the cancelled bank checks which they produce—the very check made out to Carl Shapiro did not clear September 11th—the check to himself for \$50., that cleared two days later. Do you get the significance of that? That was not cashed September 11, 1936, when it was drawn

—his own check. What would preclude anybody, with the ease and facility of this fellow, pulling blank checks right out, from signing all those checks in advance of going to Baltimore, and leaving them there? The whole caboodle didn't amount to more than five or six hundred dollars. But the purpose of Carl Shapiro was, if he had you believe it, that he never went to lunch, he did not go to the barber shop, he never even went to the bath room, he just sat there as a sentinel, on September 11, 1936, and if the jury, not all, but one or two, could swallow the idea, why, then, of course, the order could not have been given out, because Rubin and Tannenbaum could not have been there. Berger could not have left there, if Carl Shapiro did not see them. That being the case, it would fall, this case, against all three defendants—if you could believe Shapiro.

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But after Shapiro's cross-examination, after the damaging admission as to what went on in Greenberg and Shapiro's, after other things were dragged from this unwilling witness' lips, not another witness took the stand for Lepke. Did you notice that? That ended it. One almost jumped out of the chair—the other put in damaging admissions—and that ended the defense. When the lawyer tells you, "Oh, we could not bring the employees on—we could not bring the employees on. Who would believe them? That is why I ended the defense." Figure it out for yourself, if we might not have gotten some more damaging admissions from them, if the defense did not conclude. Oh, they had no obligation to make a defense, but having started it, they fell

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flat, and having started it, it provided additional corroboration to the People's case. Had that defense been successful, the Rosen case would have been successfully sabotaged against all three defendants.

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Now, let us look at Weiss' defense. Let us see how the interlinking interests went along, one with the other. Yes, an all-time low, this is. The evidence portrays Mendy Weiss to be what he is—I am not giving him any "titles," when I say it portrays him as a vicious, loathsome creature, as this evidence shows him to be. But there was brought to the stand, Lena Weiss. I had no questions to ask of this mother. He, Mendy Weiss, puts his mother on in the eve of her life—not far away from the sundown of life. He puts that poor soul on the stand to lie for him. Who would have the heart to cross-examine her? What mother would not lie for any one of us under any circumstances?

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Then we have Sidney Weiss. I want to show you the effect of this alibi, what it would have done to this case, if believed, for all three. Sidnew Weiss, the man with the twenty-sixth birthday—the birthday of birthdays in his life, the twenty-sixth birthday. This late anniversary. Sidney Weiss, who drove Mendy's car back with Blanche with him from Kansas City, Missouri. The man who made the first visit to the only outside alibi witness in the case, Dottie Isaacson—not to her house—not to Blanche who spent ten days with her in Atlantic City, but Sidney, of the late anniversary the one who was interested in the interests of justice—who went to Brownsville in the interests of justice—he meets Dottie

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Isaacson on the East Side, on the sidewalk near a candy store; his concern over his brother in the Federal "frame-up"; his calls to Portman and Rainey out in Kansas City, Missouri—the color of that "interest in justice". Sidney Weiss, if believed, would have been the saboteur of the People's case, because if Mendy Weiss was at this birthday party, Mendy Weiss could not have been pulling the trigger. If Mendy Weiss did not pull the trigger, Lepke could not have sent him. Where is the case? All three, "out".

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Sammy Weiss, the second Weiss to work on the "frame-up"—this amateur photographer. Listen to this: "Now, as an amateur photographer, how do you account for your head being on the rest of this picture, People's Exhibit Z-26, for identification? A. Perhaps the District Attorney can explain."

The Court: You cannot go into this. The picture was ruled out.

Mr. Turkus: But the question and answer were not.

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Mr. Turkus: (Continuing): I will just get through in a couple of sentences. He has disgraced the uniform which he discredits—the United States Army can do well without Sammy—the amateur photographer. Captain Ambraz of the Second Corps, can come in a suit. Sammy, with his United States Army uniform—that is enough of Sammy.

Blanche Weiss, on the alibi! Blanche Weiss, Bianche Hoffman, Blanche Newman, Rose Miller, Rose Bell—take your pick. You heard her associates from her own lips. And here is

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Mendy Weiss, putting on member after member of his family—not content, not content with the part he played in it, let them get dirtied up, so he can try to sneak out. Sacrificing the whole family, from the mother down—disgracing them, so he can hide. The damaging admission that came from Blanche Weiss, though, is important. She was in Hot Springs with Mendy. Do you remember the picture I had of her in Hot Springs, and I asked her how many copies there were, and who she gave them to? That forced the admission—she thought Cuppie may have given it up—so she admitted Cuppie was in Hot Springs in 1935 and 1936 with Mendy and her—that they all went together. This is Cuppie, gentlemen, who with Magoon, was sent by Weiss on the second attempt to kill Rubin. This is the same Cuppie Migden who was referred to when Rubin was rolling in the gutter with a bullet in his head. That was the damaging admission taken from her. That is the woman, Blanche, who accidentally met the only outside alibi witness in Atlantic City and spent ten days with her. There was not a word said about the case, although the indictment in this case came out in May, 1940, and Mendy was apprehended April 6, 1941. She is in Atlantic City with a woman who was allegedly at this birthday of birthdays. You don't hear from Dottie Isaacs until Sidney Weiss, interested in law and order, and justice, finds her on the East Side of New York, in front of a candy store. She is the woman who left New York after first spending time at the Unger flat and when west via Chicago. I don't have to go into associations there, only up in Rocky

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Ford, Colorado, and Kansas City, Missouri, and her meeting many characters out west. This is the woman who under the guise of Rosen Bell, started to knit bundles for Britain—even disgracing that lovely charity, so she could have a “cover-up” of identity, just like her husband with the documents in his pocket. Dottie Issacson, the only outside eye-witness—that poor unfortunate thing dragged in here—dragged in here for no use at all—a poor, disreputable little creature whom you cannot help but feel sorry for in retrospect. I did not feel sorry for her on the stand because she tried to sabotage this case, and possibly I went at her a little too strong—but, in retrospect, as I look at her now, I have nothing but pity for her, the wife of a pickpocket, the so-called wife of a pickpocket, I will put it that way—going back eighteen years in her associations—eighteen years through a life of crime—a miserable pickpocket—and the only outside witness to the alibi, who was met on the street, on the East Side, by Sidney. She has a lapse of memory as to everything that happened on the East Side of Manhattan this year, but she has a remarkable memory as to what happened on September 13, 1936—she remembered the birthday of all birthdays, the twenty-sixth birthday. She even remembered it was Joan Crawford and Robert Taylor who played in the picture, I think, so that poor soul, to pay off an obligation, and Mendy Weiss sat by and let that go in, too, to save him—he let that miserable little creature perjure herself, too. But if she had been believed—that she was having her toes tickled and her hair pulled,

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when, in fact, Mendy Weiss was pumping bullet after bullet into the victim in this case—if that alibi was believed—Capone did not direct the murder—Weiss could not have been there to pull the trigger—Lepke did not give the order in this murder. That was Weiss' defense, backed very neatly in summation by Capone's counsel, who tried to break the People's witnesses in every detail, even when they did not affect Capone. If he summed up for Capone alone, that would be one thing, but his summation was to pay back, to pay off, even when it did not affect his client. Think that over.

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Says Lepke's lawyers—"The Rosen family, the Rosen family." That is simply putting the dead man on trial. Let the jury forget all about the defense here—put the dead man on trial. And Harold Rosen, and Sylvia Rosen—oh, Sylvia is a vicious, vindictive woman who lied about the meeting with Lepke, Gurrah, Fields and Rubin, about the bringing in of the books. Let me tell you something—think this over—anybody in the clothing business as was Rosen—poor but for the Grace of God, say his children on the stand—let me tell you about the Rosen family—contrast the treatment accorded to the widow of the victim of this brutal murder when she went on the stand with the treatment accorded Mrs. Lena Weiss, the mother of the defendant, when that mother was on the stand. Contrast the difference in treatment, not only by questioning, but in summation. Here is one of the lowest legal punches in the case—Judge Talley—do you remember his cross-examination of Bernstein—and this is in the record, gentlemen, this

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is in the record—he said to him, Bernstein, “Muggsy Cohen, if there is such a person—Muggsy Cohen, if there is such a person.” That is why, gentlemen, I walked Muggsy Cohen into the court room in answer to that—“If there is such a person.” And, mind you, Judge Talley asked those questions, “If there is such a person,” knowing full well that there was, because Sidney Weiss had brought Muggsy Cohen to his own law office. And he asked Sholem Bernstein, “If there is such a person.” That is in the record. Now, watch the legal manouver on that. Why didn’t the prosecutor question Muggsy Cohen? Does anybody in the world doubt that Sholem Bernstein stole this car, stole the plates, and placed this car, as he said he did, in the “drop”? What was the value of Muggsy Cohen’s evidence? Another car thief—cumulative evidence that does not tend to connect a single defendant in the case? So what does Judge Talley do? He puts him on the stand and leaves him there. Did he or any other defense counsel ask Muggsy Cohen if, in fact, he did not steal the car with Sholem Bernstein? Not on your bottom dollar. That was manoueuvering—that is why I asked for a recess to think it over, and that is why I did not ask Cohen a question after recess, which happened to be after lunch. That was the smartest legal manouver in the case, to confuse the jury. Muggsy Cohen—why didn’t any single defense lawyer ask a question? What did they have to lose if Muggsy Cohen, in fact, did not help Bernstein with the car?

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Now, a few words about Capone. Watch these mental gymnastics of a legal mind: How

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could Rubin remember—how could Rubin remember—that Capone, together with Bugsy Goldstein, was in Lepke's office on the occasion before the Rosen murder? Do you remember when we picked the jury, that there was one juror here who even remembered seeing Lepke in a night club?

The Court: No, no reference to that.

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Mr. Turkus (Continuing): The visit by a member of the combination—Capone—to Lepke's office, registered with Mr. Rubin. Those things usually do register, you remember something like that. Oh, Paul Berger—there is nothing to that! Paul Berger—how does he remember Capone? Paul Berger met Capone that Friday night, that fatal Friday night when the word was sent out that Rosen had to go. When Berger was brought over to meet Mendy Weiss, when he and Mendy Weiss went over so that Berger could "finger" Rosen, that is the night he met Capone, with Mendy Weiss—the night that Mendy Weiss and Capone spoke off at a distance. Sure, the cunning, shrewd Capone—not in front of Berger—

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not on your life; but afterwards he condescended to go over and recognize Paul Berger and say, "Hello". For a big shot behind the scenes like Capone, that is something that Berger remembered, and don't you forget. That was an outstanding event which he would not forget. Capone's importance in the combination was strikingly illustrated by Weiss' visit with Capone in Brownsville, even before Berger "fingered" Rosen—before the "fingering" of Rosen was done Capone was seen by Mendy Weiss. Figure that out. From the evidence,

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and in the case, from this witness, you have heard—you saw the respect—the “sirs” that they gave to Capone. That might help you to figure out his status.

Oh, I cannot go into all this testimony and continue here ad infinitum. You cannot have forgotten it all. Let me go one point here in regard to Capone that was made so much of—Capone’s lawyer: “They did not tell Bernstein that this was a job for Lepke.” When the combination gave Bernstein an order to steal a car, I believe Bernstein when he said that at that time he did not know what it was to be used for, because he stole a car with two doors; that if he knew it was going to be a homicide at that time, it would have been four doors, so they could easily pile in and out quickly. But after he saw Capone—after he saw what was going on by way of the combination meeting and the orders he was getting, nobody had to tell Bernstein soon after that what the car was going to be used for. He could figure that out for himself. Now, Capone, they say—“Why should Capone in the presence of Magoon say that they were to do a favor for Lepke and ‘hit’ Rubin in the head and get rid of him?” That was a different story. Here they had Magoon “casing” a man who was being protected by a police guard. That gave it a different status. When you want a man to “case” a victim who is being protected by a police guard, you have got to show a very important reason for “casing” him and trying to “hit” him on the head. That is why it was said, “That is for Lepke, we have to do Lepke a favor, he is hurting Lepke, he

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has got to be 'hit' in the head." That explanation was due Magoon, if he had to go out and follow a man, "case" him, for a murder, even when a man was protected by a police guard. Even that was due Magoon, lower on the ladder than Capone though he was. And Mendy Weiss was there and said, "We will have to walk away, too," when they saw the narrow escape Magoon had, when he was stopped by the police in a laborer's clothes, and Mendy Weiss said, "We will leave it lay a while." Capone's lawyer wants to make a mountain out of this. The record shows that when I asked Magoon about his social contacts with Capone, all I was allowed to bring out on the record, there is an objection by Mr. Rosenthal and it was sustained—all I could bring out was that Magoon continued his watching—that is all I was permitted to bring out. Is it a fair argument that they had no contact? Rosenthal argued that he could not have even been in Capone's house—he did not know the street address. Did you hear Magoon describe it? Did you hear him describe the entrance and the very room he was in—the parlor? Didn't you hear him offer to take Rosenthal right to the house—and if this was a case which the District Attorney padded, don't you think I could have slipped Magoon the address? We had a picture of the house. That is the kind of atmosphere to confuse. He would have taken him right to the house.

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And then he said, "Oh, why should Capone leave himself open with Magoon on an admission, as it is called?" This was in 1939. Rosen's murder was in '36. Forgotten—practically. Nothing certainly was being done, you

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see that from the evidence, from the standpoint of prosecution.

Now I will read this from the record: "In Capone's parlor I asked him if he thought it was advisable that I work on the Friedman thing, because I hung out about a block away and I thought I would be recognized.

"Q. When you said that you hung out about a block away and 'I thought I would be recognized,'—when you said that you hung out about a block away and it was sort of off Sutter Avenue, did Capone say anything to you? A. Yes, sir.

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"Q. What did he say? A. He said, 'What are you worried about?' he said, 'I worked on the Rosen thing and it was right on Sutter Avenue, and I was not made.' Then Magoon said, 'I am not worried, Louis, I am asking for your advice.' "

There is the shrewd, conniving Capone. It is all right to put Magoon in jeopardy, but not Capone. He worked on the Rosen thing; he admitted that all right. But who could talk about him? Bernstein? An admitted accomplice. And then when you bring in Magoon, the lawyer says, "What can you tack upon Capone?" Did you ever see such creatures? Did you ever see such characters?

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What does he expect me to bring here,—people who Capone associated with? He is the one who is responsible for their production here—Capone himself. Sure, let Magoon get made. What did he care about Magoon? But he admitted, "I worked on the Rosen thing, and I was not made." He was not the man—because

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when he went by on Sutter Avenue it was in Bernstein's car—there wasn't much of a chance of picking him, or his being made. It is true he was not "made," and there was not much of a chance—he did not leave much room. The slip-up Capone made was in trying to do Lepke a favor a second time, to kill Rubin, and his admission to Magoon, who addressed him, "Yes, sir," and against whom he felt pretty safe from incrimination. And then Capone's lawyer: "Isn't it miraculous that Capone and Tannenbaum never met?" So what? Tannenbaum belonged in New York; Capone operated, as the evidence shows, in Brooklyn—pretty big by the way he ordered the men around in Brooklyn. So they never met. That made Tannenbaum frame it. So what? Does that explode the case? Does that explode the case? Capone and Tannenbaum never met. So what? So what? What is the significance?

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Oh, yes, why didn't they bring Pilch, somebody hollered—the man who was present when the guns were passed? Why, all they had to do was, to procure the production of any witness the District Attorney has in custody, get his Honor to sign a subpoena and the witness is here. What do I gain by bringing Pilch here? Another one of those characters who said he saw the guns passed—it would be cumulative—what does it mean? Did they bring him into court or ask for his production and put him on the stand? What did they have to lose?

Mikey Sycoff: why wasn't he brought down? He is in the People's custody. Does that hook Capone up with corroboration? Is it anything

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more than cumulative? Did they ask for Mikey to be brought here? What have they got to lose? They could have put him on the stand and asked him, but they didn't even do that. They talk about not producing witnesses. Oh, yes, get the jury guessing. Baseball game, somebody said. Well, that is one baseball game that Lepke didn't manage—that is one baseball game that Capone didn't captain—that is one baseball game that Mendy Weiss didn't do any hitting on. So what? The witnesses played baseball. So what? That is their interest in the taxpayers' money. Talk about a fair and impartial trial! Look what they get: Mr. Rosenthal told you I would say that, but that does not prevent me from reminding you about it. They got everything. They got twenty-three men in the Grand Jury to hear the evidence. They got an indictment. They got nine lawyers, a former Assistant District Attorney, a former Assistant United States Attorney, a former Judge of the Court of General Sessions, and one of the lawyers said, "I have no title." But he has been a lawyer since before I went to public school. He has not title? He is one of the wiliest, one of the smartest lawyers in the court-room. He doesn't need any title.

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Look what a trial Rosen got! No Grand Jury deliberated for him, when the verdict was rendered against him. Oh, yes, there is another thing which has been said:

"Why didn't Berger go in hiding?" Berger was the finger man. Nobody saw Berger finger him. What was there to go in hiding for, for Berger? Berger was safe until either Lepke or

11566

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Mendy Weiss opened up in the drama of 1936, because he certainly figured Rubin, the trusted aide, would not open up. But when the evidence started to come into our office, in June, 1941, when Berger was confronted in the District Attorney's office, as the evidence shows, held on a murder charge in the Rosen murder, as the finger man, then Berger opened. That was a different story.

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One of the lawyers said—talking about atmosphere and prejudice— “No Coughlin would stand for a Union Square fakir.” Well, no decent man on this evidence will stand for a Lepke or a Capone or a Weiss.

And now they talk about Rubin's statement, which misrepresents him. We will get through with this in about five minutes—in order not to miss a single question, give me ten minutes:

11568

“Rubin”—says the defense lawyer—I do not know the descriptive adjective he tacked onto Rubin—“the architect.” I can remember that. Judge O'Dwyer and the rest of his staff—would they sit by and let a Rubin or anybody pick three men out of seven million and send them up on a false murder charge? “Architect!” December, 1937, Rubin made a statement to Assistant District Attorney McCarthy in Frank S. Hogan's office, where he not only failed to incriminate Lepke in the Rosen murder, but in fact went out of his way to throw suspicion off him. That was a great point they raised here, to show that Rubin, who had every reason to feel vindictive, exonerated Lepke. There was a recess, and I was permitted to put one question

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and I got one answer, and the explanation was that he was afraid of Lepke.

Now let us see what the evidence disclosed in reference to Rubin's state of mind at the time he made that McCarthy statement, which, by the way, you will remember, gentlemen, was a statement that at the end of Rubin's direct testimony I had marked for identification, and then asked was it true or false, and the answer was blocked.

Let us get to this McCarthy statement. Do you remember the forecast that Lepke made about the Brooklyn investigation? Do you think that stuck in Rubin's mind? This isn't any insinuation or innuendo against any public official in the past. Public officials in the past were as honest and decent as they have been, but sometimes they are betrayed.

11570

Whether it was the boast of a kingpin like Lepke that he has an "in"—"What difference does it make?"—the forecast came out on the Rosen matter. Everything he predicted came true. Did Rubin have reason to be afraid to talk? What was his state of mind after he rolled in the gutter? Do you think he had reason to be afraid? Were his fears justified. Haven't you heard with your very ears and seen with your very eyes that even after Rubin had been shot once an attempt was made to kill him while even under police guard? Now, this is taken verbatim from counsel's summation, referring to Rubin: "I did not impute to him any wrongdoing in the Rosen case, but his own conscience was bothering him and he did not like the way I was questioning him, and he laughed at me and said, 'Maybe your conscience is bothering

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you,' when my whole proof in the case is he did not know anything about the Rosen case."

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Now listen to this: "Why should I try to implicate him when I know that statement is in existence exonerating him?" That statement was not put in evidence until long after the Rubin cross-examination on the main story. Then later, when Rubin was recalled to the stand to connect up the final link in an endeavor to spoliage evidence by shooting him through the back of the head—it shows conclusively that Lepke knew of the Rubin statement on the very summation of counsel.

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Did Rubin have reason to believe he had an "In"? We need not have much difficulty in finding out what was what in connection with Rubin. Inspector McDermott prevailed on him to come over and have a discussion with Judge O'Dwyer. Rubin was not the kind of a witness that ran to help law-enforcement agents. He was, as he said, a reluctant witness, and you can see that from the stand, and when he was asked by one lawyer, "Aren't you vindictive against Lepke?" he said, "I have every reason to be, but I am telling the truth about him." And the evidence in this case shows that he did.

Gentlemen, I told you I would finish up at "nine" on the clock. I will keep my promise.

This was no killing in the heat of passion—it was not a killing for the possession of a woman or an article of value. This was not even the killing of a corner thug on a stick-up who shoots his victim when there is resistance. This was a well-plotted, cold-blooded, brutal murder, to

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silence Rosen and to frighten others—a murder to silence the man and to frighten off others.

The District Attorney would like to convict every one of them in this matter—every one whose fingers are dipped in the blood of Rosen—that goes for the chauffeur; that goes for the finger man; but you cannot. You just cannot. Because if you do not use the finger man and you do not use the chauffeur, the three top-notchers, the three principals, would escape. The only way to bring a solution to this cold-blooded murder was to break it from within. You cannot let the three killers of Rosen escape here—the three king-pin men in the murder of Rosen—the two behind the scenes and the one firing the lethal shot, because the tools, like the chauffeur and the finger man, cannot be convicted. It would be monstrous, absolutely monstrous. It is unthinkable that such logic can be urged before a jury. Four degrees of homicide will be charged to you by the Judge. Four degrees: Murder in the first, murder in the second, manslaughter in the first, and manslaughter in the second. That is the law that must be charged to the jury in this case. That is not an indicated, that is not a signal to you to look for any compromise verdict in this case. There is no compromise with this kind of murder—the Rosen murder.

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Take the corroboration—you are going to hear the law on corroboration—take that corroboration tending to connect the defendants with the commission of the crime. There is nothing “tending” here. They are connected—irresistible and conclusively—fact on fact, by witness

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after witness. It is unthinkable that five weeks of testimony can be blotted out by the orations of defense counsel with weaseled words trying to show you the holes and flaws in the case where none exist.

11579

Gentlemen, the four degrees to be charged here are not a signal for compromise. The Rosen murder is not a case to be compromised. Bring in a verdict, a verdict that is consonant with our principles of American justice—a verdict that is consonant with the facts that have been so irresistibly and conclusively established here. There is only one verdict the law of the land will permit here on the facts by the jury and that is "Guilty," that is the guilt of Lepke, Capone, and Weiss of murder in the first degree—that is the verdict.

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The Court: (addressing the jury) Gentlemen, we will now take a recess for 15 minutes. Please do not discuss the case in the interim. This is to allow you a little time to relax so that you will not be thinking about the summation and possibly confusing it with the charge. I do not want the two to conflict. The jury may leave.

(The jury thereupon left the court-room.)

Mr. Barshay: First, your Honor, I respectfully except to the Court's refusal to permit counsel to make or take objection to the summation of the District Attorney during his summation at a time when counsel thought there

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was a proper reason and ground for the objection.

Secondly, I respectfully except to your Honor's excluding the jury now and taking these objections and exceptions in the absence of the jury, on the ground that the damage already has been done and the jury will be in no position to know whether or not the Court has ruled.

The Court: Do not argue, just take your exception.

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Mr. Barshay: Now I move for the withdrawal of a juror on the ground that by the District Attorney's unfounded and baseless statements and wrongly-interpreted statements when he wound up his summation with "Lepke knew of the existence of such a statement made by Rubin to McCarthy," and when he further said that "the statement was not offered here until two weeks after Rubin left the stand and was recalled," when the evidence specifically shows that on direct examination of Rubin Mr. Turkus personally offered the statement in evidence, which was properly objected to and sustained.

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I further move for the declaration of a mistrial on that ground.

The Court: Motion denied.

Mr. Barshay: Exception.

I object to that part of the summation of the District Attorney which was purely an appeal to prejudice and passion and not founded upon facts or a fair inference therefrom, and on the ground it contained improper statements and conclusions and improper inferences therefrom, and on the further ground that he brought, in his summation, into issue the integrity of the Dis-

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trict Attorney and his Assistants, who were not on trial. On that ground I move for the withdrawal of a juror and the declaration of a mistrial.

The Court: Motion denied.

Mr. Barshay: Exception.

11585

May I point out specifically some of the things which are prejudicial in nature and use them as the basis of a motion for the withdrawal of a juror and the declaration of a mistrial? For example, when he urged in his summation this point: "What would have happened to Patrolman Cappadora if he came along at the time?"

The Court: If there is much of this, you had better submit it in writing and put it on the record later.

Mr. Barshay: That is all right. I will dictate them separately.

11586

The Court: If any attempt is made by each of counsel to review the entire summation and to make motions based on each and every point on which they do not agree, it is going to take a very long time and it will serve no useful purpose. It simply is not done—I have never found it to be done.

Mr. Barshay: We will do it your way, Judge.

The Court: There are plenty of places where counsel on both sides crossed the line. Due latitude for encroachment is recognized in summation. I never heard one that was strictly fair to anyone else.

Mr. Barshay: I will reserve my rights in accordance with your Honor's instructions.

Mr. Talley: I ask that all the objections made to the summation by either or both other counsel

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in this case apply to the defendant Weiss. I have one or two objections which I would like to urge now, which will only take a couple of minutes.

The Court: Yes.

Mr. Talley: I except to your Honor's direction to counsel that there be no interruption of the summation of the District Attorney. I object to the District Attorney's summation upon all the grounds presented and to be presented by counsel for the defendant Buchalter.

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I ask that an exception be granted on each and every one of those grounds, if denied.

I object to the summation of the District Attorney upon the ground it is based solely—or rather, the appeal was based solely upon passion and prejudice, to the prejudice of the defendants.

I object to that part of the summation which constituted an attack—because it was so unjustifiable and unjustified—upon defendants counsel. For instance, reference to the defense of Weiss, and in reference to the episode of calling the witness Muggsy Cohen, a witness in the direct custody of the District Attorney, as “the lowest bunch in the case.”

11589

I object to all reference by the District Attorney to the shooting of Rubin as being perpetrated by Weiss, upon the ground there is no credible evidence to justify that contention. In any event, it was a reference and discussion in an attempt to persuade the jurors with reference to a separate and distinct crime from that which was named in the indictment.

I object further to the misquotation of evidence and to reference to matters by the District Attorney not in the evidence at all.

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I move for the withdrawal of a juror and the declaration of a mistrial upon those grounds.

The Court: Motion denied.

Mr. Talley: Exception.

Reference was also made by the District Attorney as to money being paid to defendants' counsel being tainted. I take an exception to your Honor's failure to not only warn but to stop the District Attorney from making remarks of that kind.

11591

The Court: Motion for a mistrial; denied.

Mr. Talley: Exception.

Mr. Rosenthal: May I have it appear at this time that I have refrained from interrupting the District Attorney's summation when I considered, at times, it was highly improper, merely because of the Court's admonition not to do so, and that I will submit, in accordance with the Court's statement to Mr. Barshay, in written form, various items which I consider were improper in this case and which I would have had reason to object to, had I not had the Court's admonition not to interrupt, and upon that written statement which I intend to submit I ask for the withdrawal of a juror and the declaration of a mistrial because the appeal, in so far as the defendant Capone is concerned, was purely to prejudice and passion, and not in any wise founded upon the evidence, but merely and clearly avoidance on the part of the District Attorney to in any wise attempt to justify from the evidence facts sufficient to warrant the jury in finding a verdict as against him.

11592

The Court: Motion denied.

Mr. Rosenthal: Exception.

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11593

I understand I have permission to submit these in writing to the stenographer, so they may be spread on the record?

The Court: I will take them now. I will take the motion now.

Mr. Rosenthal: I did not mean the motion; I meant the statement.

The Court: Before this jury comes back, whatever you say is going to be on the record.

Mr. Rosenthal: I thought your Honor said we could submit.

11594

The Court: I am not going to give permission, after the trial is over, to argue an appeal on a padded record.

Mr. Barshay: I will put mine on the record very quickly.

I object to the statement of the District Attorney with respect to "What would have happened to Patrolman Cappadora if he had come along when Weiss and the others were outside of Rosen's candy store?"

I object to the reference by the District Attorney in his summation, to this part, where he said, "Do you think that Rosen had only that complaint to make?"

11595

I object to the constant reference by the District Attorney that counsel for the defendants were seeking to confuse one or two jurors for the purpose of obtaining a disagreement or a hung jury.

I object to the Assistant District Attorney's reference to that part of the activities of counsel with respect to Rubin's testimony: "If, next month, the defendant Buchalter will be in Man-

11596

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battan, his lawyers will have him running from O'Dwyer."

Mr. Turkus: I never said that at all.

Mr. Barshay: We object to the reference of counsel for the People to the fee we received in this case, saying that it was "tainted money," as compared to the fee which the City pays him, or words substantially to that effect.

11597

I object to counsel for the People urging to this jury that counsel for the defense asserted or insinuated by direct evidence or by inference that we accuse Judge O'Dwyer or his Assistants of framing the defendants, or that they suborned perjury, or that they have committed subornation of perjury, and that we put the District Attorney's office of Kings County on trial, when the facts show directly to the contrary.

The Court: Do not argue. This is all out of order. It has never been done in any trial before. I have indulged you to the utmost throughout this trial, and that is the only reason I am allowing you to do it.

11598

Mr. Barshay: I object to the District Attorney's charge that counsel for defense is accusing the District Attorney's office of attempting to murder these defendants.

I object to the statement of the District Attorney that counsel knew, when they were retained, that the defendants were guilty.

I object to the statement that the lawyers in the court-room knew the defendants were guilty and that the people in the court-room knew the defendants were guilty, and on that score may I say to your Honor, while there is not any evidence, there is some talk that relatives of the

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jurors have been in this court-room during part of this trial.

The Court: Strike that out. It is wholly unwarranted. If you make any more misstatements like that, I will direct you to take your seat. You have no right to make such a statement. That is manufacturing a record.

Mr. Barshay: I take an exception.

The Court: When counsel sum up in the course of three days, it stands to reason the summation steps on somebody's toes over and over again.

11600

Crying over it after it is all over is not nice. You never get anywhere in this world by crying.

Go ahead with your exceptions.

Mr. Barshay: I take an exception.

I object to the District Attorney saying in summation, referring to his own office, the reason they did not take a stenographic statement was because there were prying fingers or lurking eyes who can see it, and therefore they made memoranda on pads; and at the same time that they knew they were dealing with men whose fingers were steeped in blood.

11601

I object to the District Attorney saying in summation that while he was questioning Tannenbaum, Tannenbaum kept on saying, "I assert my Constitutional rights," when the evidence shows he never questioned Tannenbaum on the Rosen case.

I object to the insinuation by the District Attorney that Lepke was indicted in 1940 and was not arraigned until 1941, as innuendo that may

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lead the jury to the conclusion that Lepke was in flight, when the fact is—

The Court: Do not argue; take your' exception.

Mr. Barshay: All right, I except.

I object to the District Attorney saying, "If they had not been"—referring to the defendants—"killers of Rosen, you would not have to sit here."

11603

I object to the District Attorney saying that Rosen had the foresight to run to Pennsylvania from the New York racketeers, on the ground there is no proof in this record to that effect.

The Court: I will not hear any more argument. After mentioning the ground, the rest is entirely out of order.

Mr. Barshay: I take an exception.

May I argue that?

The Court: No, sit down. We will indulge in no more disorder.

11604

It only demonstrates that the Court was wise in not permitting the sabotage of any summation, but enforced from the beginning the request that due courtesy be shown by one counsel to the other in permitting orderly argument.

Mr. Barshay: I take exception.

Mr. Talley: In addition to the objections I have urged upon your Honor, I object to the reference made by the District Attorney about money paid to the defense counsel as contrasted with the compensation that he receives as Assistant District Attorney.

I object further to the reference that he made that counsel for the defendant Weiss was willing and ready to interfere or "sabotage," to use his

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word—with the investigation being conducted by the District Attorney.

I make the further objection, with great respect, to your Honor permitting a blown up photograph, being about 4 feet by 5, or 4 by 4, let us say, affixed to a board about 5 by 6, placed behind the witness chair, in full view of the jury just at the time of the beginning of the summation of the District Attorney.

The Court: That is another statement for the purpose of manufacturing a record. The Court did not know of it until you attracted its attention just now. The exhibit is of no value whatever and it could not possibly influence the jury. You saw it throughout. If you wanted to object you could have stood up and called attention to it. You are now accusing the Court of permitting it to be there or permitting it to be used, and that is untrue.

11606

Mr. Talley: Surely your Honor does not say you have not observed it; that board was directly behind you.

The Court: My back was turned to it; you were facing it throughout.

Mr. Talley: I note an exception to your Honor's remarks in regard to the photograph.

11607

The Court: This is disorderly.

Mr. Talley: Note my exception.

Mr. Rosenthal: I intend to make a general objection, without quoting from the summation itself.

I object to the summation of the District Attorney upon the ground that it places before this jury a false issue, the integrity of the District

11608

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11609

Attorney; further upon the ground there were statements made by him not contained within the record of this trial; further upon the ground that by his summation he drew, indirectly, an inference as to Capone's failure to take the stand, contrary to law; further as to his unwarranted characterization of defense counsel; further, his reference to "combinations" of people outside of the jury box; and further, his reference, in so far as attempted spoliation of evidence is concerned, with respect to the defendant Capone.

The Court: Now the Court instructs the court officer to remove from the room all of those enlarged photographs and to put them in an adjoining room. I have not eyes in the back of my head. I will not have any more manufacturing of the record that is impugning the honor of the Court. I also instruct the Clerk to find out who put it there at the beginning, or whenever it was put there this afternoon.

11610

Clerk Clark: This is the first time I noticed it, Judge.

The Court: You did not notice it either?

Clerk Clark: No, sir.

The Court: I want to find out who gave the tip-off to put it there, because, obviously, it was for the purpose of manufacturing a record.

The Jury then returned to the court room.

11611

The Charge of the Court

TAYLOR, J.—Members of the Jury, the case is submitted to you today, even though it involves a late charge of the Court, because the time is now 3:20. It is done because one of the counsel for the defense has to be in the Court of Appeals in Albany on Monday, and that takes precedence over the trial of this case. I do not think it advisable to let you be for two days idle under simply a direction by the Court not to discuss the case. Forty-eight hours is a long time to keep people together after summations by all sides. It therefore seemed better to charge the jury today.

11612

Under Section 5 of the Judiciary Law, a verdict may be taken on a Sunday, so there will be no interruption of your deliberations.

I wish to impress upon you this: When you go to the jury room just put entirely out of your minds any desire that any of you may feel to be back with your families or back in your homes. You will be a good many years, I hope, in the company of your families, but after being for so many weeks in the trial of this case, the issue in this case is of paramount importance. Just now it completely overshadows the matter of personal convenience of any member of the jury or of the Court. The important thing is to get a mature decision, based upon the evidence and the evidence alone, a decision which will be fair and impartial, which will be without passion, without prejudice, and without sympathy.

11613

In one of the summations you were told that the only reason for a special jury is in order to save time in the selection of the jury. That is not strictly correct. The fundamental statutory

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The Charge of the Court

purpose of the special jury is to get men who are above the average in both intelligence and character to determine issues presented on trial in either civil or criminal cases, where those issues come under the provisions of that statute, and thereby indicate the advisability of having a jury above the average in intelligence and character. I think that is a fair statement.

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At the outset of this trial, when you were selected, you took an oath to render a true verdict upon the evidence. That means upon the believable evidence and the case and upon the legitimate inferences which may by law, within the province of the jury, be drawn therefrom.

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The case must be decided fairly, without prejudice and without sympathy. That means not only to one side, but to both—fairly, without prejudice or sympathy to either the defendants or to The People of the State of New York—because this requirement is a rule that works both ways. The scales of justice must be kept evenly balanced to see that the rights of both sides are respected. That is what the trial of a case in court, according to accepted standards, means.

Of course, gentlemen, after the evidence is in, each side has a right to argue its case. This presents practical difficulties, because there is a tendency for anybody, in arguing his own side of the case, to step across the line; but the argument of a case, that which is known as the summation, must not be a fight among counsel. Each side is entitled to state its argument without interruption. Of course, when there is an overstepping, I trust that you recognize it. You will not be inflamed by anything that is said,

The Charge of the Court

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and you will not be misled by departures from the record. You will apply such parts of the argument as received from any counsel only as it affects the record, the evidence in the case, and use it only as your guide, if it meets your own common sense and judgment.

At the outset I asked all counsel to respect one another's rights, and on the first two or three objections by the District Attorney, I put an end to any further interruptions. I tried, fairly and without playing favorites, to notice certain things that required judicial interruption. That is different because the Judge is not fighting either side. The Judge is trying to avoid being knocked down by both parties to the fight. The Judge is like a referee, rushing in between combatants. He takes a chance of being hit, but he does not hit back.

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The question of application of the rule of fairness is not one of mere apportionment; it is one of applicability according to wherever those rules indicate truth and justice lie. Decide the case upon the believable evidence as you find it to be established.

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As you sift through the mass of testimony that has gone into the case, in a record approximating a million words, you will seek to bring forth the germs of truth. Decide without fear and favor; see that the rights of both sides are preserved throughout, and to the full extent permissible, without prejudice.

If it is not established beyond a reasonable doubt that the defendants, or any of them, are guilty, there shall be an acquittal of such defendant or defendants. If beyond a reasonable doubt you find the case to be established as one

11620

The Charge of the Court

of guilt as to any or all defendants, you will announce that verdict at the conclusion of your deliberations.

11621

Questions of law are for the Court. It is not the purpose of the Court, in making any allusions to evidence, to do so for the purpose of refreshing recollection or particularizing in order to emphasize one point as against another. You heard the witnesses. You heard the evidence exhaustively discussed by counsel. The Court placed no time limitation upon the discussion, simply tried to preserve order and dignity, two qualities which are inherent in the administration of justice, and which it is the duty of the Judge to do.

It is the record of the evidence that counts, and that is left to your memory, to be refreshed in such particulars, if any, as you may desire, by a re-reading of minutes on any particular point, should that be necessary.

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When I said that questions of law are for the Court, that means that you must eradicate from your minds any interest in the rulings of the Court upon objections of counsel. There is a little way that lawyers have, regardless of which side they represent, of arguing back when the Court rules on points which are so simple that they know as well as the Judge does that the Judge is right. It is a pardonable trend, but, if the Court permitted it, it might presently get some jurymen thinking, "I wonder if this Judge is giving a fair trial? If I were the Judge, I would rule so and so." Well, of course, the answer is that the Judge has a lifetime of study and experience in learning the rules of evidence, and the jury is a lay body with no knowledge

The Charge of the Court

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of the law of evidence, so the jury has nothing to do with that.

If the Judge makes a mistake—and to err is human—there is another way of its being corrected, if correction be necessary.

The law requires the Court to charge, for one thing, that the jury shall not consider the question of punishment. That is not the responsibility of the jury. That is the responsibility of the law of The State of New York or, in a lower degree than murder in the first degree, it is to a certain extent within the discretion of the Judge. I say that because the law says the Judge shall so charge the jury. There is a good reason for it. In a capital case the jury must get out of mind that it is fastening the punishment. It is the law that fastens the punishment. With the spectre of punishment before the juror's eyes, he may think that he is disinclined to view the case impartially, logically, and honestly, in accordance with his oath of office; so I charge you that your sole responsibility is to decide whether or not the defendants, or any of them, are guilty, and consider that the question of punishment is not in your province but is that of the law and of the Judge.

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The indictment charges murder in the first degree, committed as follows:

"The defendants, on or about September 13, 1936, in the County of Kings, wilfully, feloniously, and of malice aforethought, shot and killed Joseph Rosen with revolvers."

You will not be concerned with the severance as to one of the defendants, in fact, you will not be concerned with any of the procedural matters connected with the trial of this indictment. Just

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have this in mind, that is the indictment, and that is what each of these three defendants is charged with.

Under the law which permits the three defendants to be tried together, you will have to consider in connection therewith the definition of the word "principal" as set forth in Section 2 of the Penal Law, which reads as follows:

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"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a 'principal'."

You see how broad that is. A principal means, of course, that he is guilty, if he is a principal. It includes not merely the man who does the shooting; it includes the lookout, the wheel man, the finger man, and the man who, even though at a distance, gives the directions.

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The law provides that where one degree of crime is charged the Judge shall charge the jury as to all other degrees and for that reason the Court is charging you in this case as to two degrees of murder and two other degrees of homicide, to wit, manslaughter, but instructs you that your verdict, if one of guilty, shall be of such crime and of such degree of crime as is shown by the evidence to be the one that was committed. Do not compromise. Find your verdict according to the evidence.

The law says that no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the

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fact of the killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

The former is what is known as "corpus delicti." There, you see, direct proof is necessary. It would never do to convict somebody of murder and then find out, after the penalty of the law had been carried out, that the alleged victim was still alive. You cannot take chances on that. You need direct proof.

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For that reason, during the first part of the trial, considerable time was taken up in proving what is known as the corpus delicti, consisting of the testimony of the Medical Examiner and of those who found the body and identified it to the Medical Examiner, knowing it to be the body of Joseph Rosen.

I charge you now that the difference between murder and manslaughter is this: With murder there is an intent to kill; with manslaughter there is a killing, but without intent to kill. The intent to kill may be inferred from the act itself because it may be reasonably assumed, under given circumstances, that a person intends the reasonable and natural consequences of his act.

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You will not consider manslaughter at all unless you find that there was a killing but not with an intent to kill and that the killing was done by these defendants or any of them.

I am charging you on these different points because the law says I must. Don't think it is a cue to compromise. I have charged you not to compromise. Your verdict shall accord with the evidence.

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The difference between murder in the first degree and murder in the second degree, broadly speaking, is that murder in the first degree is done with premeditation and deliberation, whereas murder in the second degree may be killing with intent to kill but without premeditation and deliberation, and so you find murder in the first degree as applied to the alleged facts in this case to be defined as follows: "from a deliberate and premeditated design to effect the death of the person killed."

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On the question as to what is necessary as premeditation and deliberation, I charge you that all the law requires is this: There shall be some reflection and some thought which precedes the act. If there is thought, if there is reflection on the act, and if there is a choice and determination as the result of these mental actions, then there is sufficient deliberation within the law. It is only essential that the period of premeditation shall be long enough for the perpetrator to decide between doing and not doing the act. Nevertheless, I charge you that in your application of that, the period must not be simply such as to permit a conviction in the first degree upon a microscope or infinitesimal consideration and conclusion so far as the time element and deliberative element are concerned. Deliberation means a very real thing. It means an act of the intellect. It means something in the nature of a cold-blooded decision, rather than a hot-blooded, irresistible act.

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Murder in the second degree is defined, as applied to the alleged facts in this charge, as follows:

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"Such killing of a human being is murder in the second degree when committed with a design to effect the death of the person killed but without deliberation and premeditation."

But deliberation and premeditation, as with intent to kill, may be, I charge you, inferred from the act, and where there is evidence of preparation, evidence of a preconceived intent, and that evidence is unmistakable, or, at least, I should say if it is established beyond a reasonable doubt, that is murder in the first degree and is not murder in the second degree.

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Manslaughter in the first degree, as applied to the alleged facts embraced in this charge, is stated by law as follows:

"Such homicide is manslaughter in the first degree when committed without a design to effect death, in the heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon."

Manslaughter in the second degree—and only such part of the definition as could possibly be construed as having application to the alleged facts in this charge—is defined as follows:

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"In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual, or by any act or procurement of any person which, according to the provisions of this article, does not constitute the crime of murder in the first degree or murder in the second degree, nor manslaughter in the first degree."

I charge you that the verdict as to each defendant and your consideration of the evidence as to each defendant shall be separate, because, from place to place on the record of this trial,

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is evidence applicable to one or two defendants only. These three defendants are tried together because that is provided for by a statute of this State. We cannot question the wisdom of that statute. It was passed by the Legislature and signed by the Governor. It is the law. But that does not lessen your responsibility in seeing that the evidence as against each is properly segregated and applied only as to him.

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I shall have to later come back, and in a sort of way which I hope will be fair, attempt to point out certain parts, possibly the bulk, possibly all of the points of evidence in connection with the defendant or defendants to whom they apply. I will do that as a safeguard against your own confusion, but when I do it, remember it is your own recollection of the record that counts. Try as hard as I may to be fair in epitomizing for the purpose of segregation from, as I said, approximately a million words of record, I do not guarantee it to be true, because I cannot give assurance against the human frailty of making mistakes.

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Your verdict, as I have charged, shall be separate as to each. In announcing it, I wish you would bear in mind to make your announcement in substantially the following form—please remember this, Mr. Foreman—in returning your verdict, say it something like this:

“We find the defendant Buchalter”—and then announce “guilty” or “not guilty” or “disagree”;

“We find the defendant Weiss”—and then announce “guilty” or “not guilty” or “disagree”;

“We find the defendant Capone” “guilty” or “not guilty” or “disagree.”

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But remember, as to disagreement, that while the law permits that you may agree as to one or two and disagree as to one or two, it is in the discretion of the Court to keep you out longer than you may think necessary in an effort to harmonize you and to get you to agree as to those whom you have thus far or up to that point failed to agree on.

I charge you that when the evidence approaches such a point, and only if it approaches such a point as to establish a conspiracy, a coming together of minds and an agreement and an overt act pursuant thereto for the purpose of doing a homicide, only when and if that point is reached may the act of one person be binding upon and become the act of another, but if that point is reached then from that moment on, from the moment of coordination and joint action as evidenced by an overt act—and only one overt act is needed—then the act of any defendant pursuant to such conspiracy, may be binding upon the other or others, and bring them all within the provisions of Section 2 of the Penal Law defining principal. This does not apply, however, to anything that may be done after the commission of the crime or anything that may be admitted by one and not by another concerning what is alleged to have been done. On the latter point, let me specifically say that if, after the commission of a crime, a defendant runs away, that counts against him but it does not count against those who do not run away.

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If a defendant causes a witness to run away, that comes under the law known as spoliation of evidence, and that counts only against such de-

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defendant as causes the witness to run away. This applies likewise to hiding.

If a defendant tries to kill off a witness, that comes under spoliation of evidence and it counts only against such defendant as is in on it. It does not count against those who are not shown by the evidence to be in on it.

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Likewise, if after the commission of a crime one or more defendants admit guilt or make any admissions along the line of guilt, those may be counted as evidence only against the one who makes them, and are not binding upon or applicable to any of the others. Please bear that in mind. I emphasize it because it is a very important point in this trial.

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It is alleged in this trial, and is submitted to you on the evidence, that Weiss ran away and he ran away after a declaration that "It looks like Allie was talking and I will have to duck," and that when he was picked up in Kansas City he made a statement to a Federal agent in which he specifically referred to O'Dwyer and to the position he would be in, sitting between O'Dwyer and Dewey, and that it had been his intention to return after O'Dwyer was out of office, which, as implied by the evidence, would be after a reasonable length of time. Of course, that is up to you to figure out.

As to the alleged Rubin spoliation, that is, getting Rubin to run away and hide in various places in the United States and secrete himself in various places in the city under assumed names and, at times, in disguise, and the alleged conversations between Buchalter and Rubin in connection therewith, and the bringing in or al-

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leged bringing in by Buchalter of Berger to take charge of it, under Buchalter's supervision or direction, that has nothing to do with anybody except Buchalter, because there is not a scrap of evidence that either Weiss or Capone had anything to do with that, but—and this is very important for you to bear in mind—the alleged shooting of Rubin through the head was months after Buchalter was last seen in town. When he was last seen in town, he is alleged to have made a statement to Berger that he would have to get out, things were getting too hot, or words to that effect. So you see there is no evidence connecting Buchalter with that shooting. That would come down to Weiss and Capone. The evidence for you to consider in connection with that I will have to come back to later, because I want to be accurate. It concerns both Weiss and Capone, that is, so far as your consideration is concerned, but without any hint from the Court as to how you shall decide the truth or the falsity of the evidence on that point or what inference you consider legitimate to infer from the evidence on that point.

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The law says, concerning overt acts, that no agreement amounts to a conspiracy unless some act besides the crime be done to effect the object thereof by one or more of the parties to such agreement.

The defendant in a criminal case is presumed to be innocent until the contrary be proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. So that is the task which you have to face; that is the task to which you must give

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all of the intelligence that is in you, in order to accomplish an accurate solution.

11651 It has been said, I believe, in the course of this argument, that a reasonable doubt is one for which you can give a reason. That, however, is not strictly clear, because there may be good reasons and there may be bad reasons. The law does not mean a doubt the reason for which it is unsound or whimsical. It means a sound, sane, intelligent doubt existing in the mind of a man who has brains which he is willing to use and does use in an earnest application of them whereby to arrive at an accurate conclusion from the evidence.

I will read you something on the question of reasonable doubt from an authority. I think it is considered good law, because this is quoted from the case of *Holt v. U. S.* It was in the United States Supreme Court, and I am reading from the opinion (218 U. S. 245):

11652 "A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant is entitled to have the benefit."

Gentlemen, in quoting from what an appellate judge writes, that only reflects his own expression, but it comes from a high source and,

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even if it may be debatable as to an accurate statement of text, it is worthy of consideration because of the high source from which it comes.

Now I will quote from *People v. Trimarchi*, 231 N. Y., from an opinion in the Court of Appeals:

"The rule is that all the evidence, when considered by the jury, must, beyond a reasonable doubt, exclude or remove every other reasonable hypothesis than that of the defendant's guilt. The evidence of facts and circumstances, in order to justify a conviction, must all be consistent with and point not only to the guilt of defendant, but they must be inconsistent with his innocence."

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I think that is enough on the point. You have brains and I trust you will use them.

On the question of accomplice turning State's evidence, we have a statute which reads as follows:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

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Bear in mind this part of the text: "as tends to connect". That is all that is required.

Gentlemen, this is very important in this case. Please follow me closely. Don't let your attention deviate. I will read it again:

"A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

In connection with the meaning of the word "accomplice" I will read again Section 2 of the Penal Law defining "principal", because when

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that statute was enacted in this State it threw together both the common law meaning of "principal" and "accomplice" under the head of "principal."

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Under that statute in this state an accomplice has to be found, in order to be an accomplice, to be a principal. In common law the principal was the man who did the actual act. A man who met any of the other requirements of this statute was known as "accessory before the fact." But, as I say, these two have been united in this statute. I will read it again:

"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal."

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That is what is meant by the law when it says "accomplice". The law says that the question is one of law, and the Judge must decide it unless there is a dispute of fact. In the latter event, there can be a decision either one way or the other by the jury as to whether or not a man is an accomplice within the meaning of the law as charged by the Judge, but if there is no dispute of fact on that point, the Judge must instruct the jury as to whether or not the witness is an accomplice. If there is a dispute of fact, that is, a contradiction or conflict of or in the evidence, or if there is any evidence from which the jury may find, directly or as a legitimate inference, that the witness was an accomplice, and that is an issue, so that if certain evidence is accepted the witness may be an ac-

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complice or if certain evidence is, on the other hand, accepted, he is not an accomplice, then the question is one for the jury to decide, as to which evidence is true and which evidence is false, or what is the inference to be drawn from uncontradicted evidence which is capable of more than one construction but is sufficiently ambiguous to require an application of the jury mind in determining the question.

Here is what the law requires, according to the accepted authorities of the learned Appellate Courts of this state.

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"The other evidence required to corroborate the testimony of an accomplice need be no more than as tending to connect the defendant with the commission of the crime."

It is enough if it tends to connect the defendant in such a way as may reasonably satisfy the jury that the accomplice is telling the truth. The corroboration is not restricted to any particular point. Its connection with the defendants' own statement and denials, if any, should be considered where by witnesses an issue is created, or if the statements or denials are put in as having been made prior to the trial and therefore in the nature of admissions.

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It may vary in its nature according to the circumstances of the particular case. It is not necessary that corroborative evidence should of itself be sufficient to show the commission of the crime or to connect the defendants with it, but it is sufficient if it tends to connect the defendants or any defendant with the commission of the crime.

As stated substantially in a leading authority

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in this state, *People v. Cohen*, in the Court of Appeals, the statute does not require that the whole case be proved outside of the testimony of the accomplice. It simply requires evidence from an independent source of some material fact or facts tending to show that a crime has been committed and that the defendant was implicated in it.

11663

I now charge you that both Paul Berger and Solomon Bernstein are accomplices as a matter of law. Please bear this distinctly in mind. I am mentioning the names of Paul Berger and Solomon Bernstein, but they are the only ones in the case who are accomplices as a matter of law. Therefore, the law as to accomplice corroboration which I have read applies as to their testimony. They must be corroborated by such evidence as tends to connect the defendants or any of them with the commission of the crime, but it is not required that the whole case as testified to by Berger and by Bernstein be proved outside of their testimony. It simply requires evidence from other witnesses who are not accomplices, of some material fact or facts tending to show that a crime has been committed and (I stress the word "and") that the defendant or defendants were implicated in it.

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I now charge you that I find in the record no evidence from which I can be justified in submitting to you that either Rubin, Tannenbaum, or Magoon is an accomplice in the murder of Rosen. You cannot guess at it. To submit the question of either Rubin, Tannenbaum, or Magoon being an accomplice in the Rosen mur-

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der, there must be something in the record to submit to you so that you may find them or any of them to be accomplices as a matter of fact. There is no such evidence in the record. I cannot charge that to you and must therefore charge you to treat their evidence as coming from witnesses who are not accomplices. Remember that, now: Berger and Bernstein are accomplices. Rubin, Tannenbaum, and Magoon are not accomplices in the Rosen murder.

The statute as to accomplices does not apply as to collateral matters. Unquestionably, if you accept Rubin's testimony that he ran away and hid to protect Buchalter, that makes him guilty of attempted spoliation of evidence, flight and hiding, making evidence unavailable without which investigations collapse, but that does not come under the accomplice act. He does not have to be corroborated for that. If you believe him, you can take his testimony as true, without corroboration.

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Likewise with Magoon. Magoon is a crook, murderer, and he, according to the evidence, if true, was hooked up with an attempted spoliation of evidence by attempted assassination of a witness. That is another matter. That is not the Rosen murder, and the accomplice statute does not apply to that, so he does not have to be corroborated as to that unless you independently find that he has, in order to satisfy yourselves as to the truth of his statement.

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The same way as to Tannenbaum. Tannenbaum testifies as to certain alleged admissions, hooking up Weiss, but, according to the record, there is nothing to show that Tannenbaum was

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in any way connected with the Rosen murder; therefore you have a right, if you see fit to accept Tannenbaum's evidence without corroboration, to do so.

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Of course, the law never charges a jury that it must have no corroboration. That would be foolish. The law leaves it to the jury to say in any case whether it accepts the testimony, or any part thereof, by a given witness or witnesses without corroboration, or to require corroboration if it deems that necessary; or, if corroboration has been given, whether or not to require farther corroboration. That is within the province of the jury on all points, in all cases, regardless of the question arising out of the accomplice statute. That has always been so. It was so long before the accomplice statute was even thought of.

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It is for you and you alone to say whether the evidence on a point required to be corroborated, given by the non-accomplice witnesses, is true or whether, on the other hand, it is not sufficiently shown to be true, this because you are the sole judges of the facts; but if you find such corroborative evidence to be true, to be duly established to your satisfaction, then it is for you to say whether such as you find to be established constitutes evidence tending to connect the defendants or any of them with the commission of the crime as provided by the statute to which your attention has been directed.

Now, the law as to spoliation of evidence: The act of intentionally destroying or fabricating evidence has always been regarded with suspicion. It is a circumstance indicating a weak cause.

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One's conduct in thus destroying evidence may be attributed to a belief that the truth would have operated against him. The unfavorable inference will not arise unless the destruction was intentional.

It is well said that the deliberate destruction of written evidence, or, you might say, any evidence, gives rise to the inference that the matter destroyed is unfavorable to the spoliator. This unfavorable presumption will not dispense with the necessity of the other party's introducing some other evidence. The force of the inference is rather of deliberative than of probative value, of subjective rather than objective relevancy.

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The law as to fabrication of evidence is the same as spoliation.

The law as to running away and hiding, you may say, has substantially the same force as an inference on the fabrication of evidence or the suppression of evidence in this respect: that it is of deliberative rather than probative value, but it may be of probative value, depending on the circumstances, and, if correctly hooked up, that is up to the jury to say.

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Obviously, a person running away may fairly be said to run due to an impulse of fear; but we come to the next question: What is he afraid of? Is he afraid of being caught and convicted because he is guilty, or is he afraid of being caught and convicted because he may be framed, or because, upon fabricated evidence, he may be convicted of a crime of which he is not guilty?

You see, that is an open question, so it all depends on the particular case involved and the

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facts thereof as to what the legal effect or inferential effect is of the alleged flight.

It has been stated, and it may be fairly considered, that flight from justice and its analogous conduct have always been deemed indicative of a consciousness of guilt. It is today conceded that the fact of an accused's flight, escape from custody, resistance of arrest, concealment, or assumption of a false name and related conduct are admissible as evidence of a consciousness of guilt and thus of guilt itself, but the weight which the jury is entitled to give it depends, as I have stated, upon the circumstances of the individual case.

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I will read from text, just for guidance, not as a necessarily accurate statement of the law, but as an expression from an opinion of the court of last resort in this state, *People v. Florentino* (197 N. Y.):

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"Evidence of flight is competent because, when unexplained, it tends to show consciousness of guilt, though standing alone it raises no legal presumption thereof. When the crime is proved, but the identity of the criminal is in doubt, it depends somewhat on the question of identity. Ordinarily it is of slight value, and of none whatever unless there are facts pointing to the motive which prompted it and, hence, any explanation of the accused should always be considered in connection therewith."

The points of alleged spoliation of evidence which may be considered will be reviewed further on in this charge.

When a witness takes the stand to be cross-examined, he submits not merely to ordinary

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questions, but to leading questions. The lawyer who puts the witness on the stand for direct evidence is not, ordinarily, permitted to ask leading questions, although the trial court may, within sound discretion, so permit, and it has not been the policy of the Appellate Courts to disturb it when the discretion is fairly exercised, but, ordinarily, the asking of leading questions is permissible only on cross-examination and in certain circumstances, as I have mentioned, which are discretionary in direct examination.

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Also, we have two rules of evidence which counsel is entitled to use on cross-examination, if he sees fit. This is a little technical. I am telling you of it, not in submitting it to you as an issue, but in order to clarify your minds on rulings of evidence which you have listened to, so that you will not intrude upon the Court's function in that respect.

One of these is known as specific impeachment and the other is known as collateral impeachment. Specific impeachment would occur in a case where a witness, taking the stand, is asked by counsel if on a previous occasion he said or did something which contradicts anything that he has just testified to on the stand. If the witness says yes, the witness thereby becomes specifically impeached. It simply means that what he says on this occasion is impeached by something he said in contradiction thereof or in variance therewith at another time, whether wilfully untrue or due to memory fault. If the witness says no, then the lawyer is entitled to later put witnesses on the stand to prove that he did on a certain occasion say thus and so

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which is in contradiction of or variance with the present testimony, or to read testimony given by the witness on the previous occasion covering the point and shown to be contradictory, that is, inconsistent with the testimony presently given on direct examination. That is the reason why stenographer's minutes of other trials or hearings where questions and answers are used may be made a method of cross-examination.

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The usual method is to say, "On such and such an occasion were you asked the following question and did you give the following answer?" Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is an unholy thing. We have a court reporter here to supply daily minutes in this case because counsel forget over night the questions and answers in text form of the day before; but, you see, when a witness is asked, "Answer yes or no," about something that he testified to a long time before, you get a normal response sometimes, "If it is in the book, it is so." There is a concession of the accuracy of the minutes the witness is not disputing. I am just calling your attention to it. That is a matter of application of sound common sense.

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Concerning what we know as collateral impeachment, however, we have a narrower rule in one respect. If a witness says no, that ends it. Counsel can cross-examine until Doomsday, but when a witness says no and sticks to it, counsel is not permitted to put any witness on

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11683

the stand or to introduce any other evidence to prove that the "no" answer is not correct.

Now, you see there is a sound reason for that. If you allowed the actual trial of collateral points, the jury would get so mixed up it would not know what the case was about. The law has for a long time recognized that and has said, when the witness says no on a collateral matter, that is binding. Both sides must accept it whether they like it or not.

In collateral impeachment we also have alleged misdoings and previous criminal convictions of the witness who is testifying. Anything that depends upon his honesty should be considered in determining whether or not he is likely to be telling the truth. You are entitled to know who is being examined and take that into consideration in judging the worth of his testimony.

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The only condition under which the witness's "No" may be contradicted is where he denies a criminal conviction, and the only reason that there is an exception there is that the statute was passed in this state which permits it. It is the only exception. In cross-examining a witness he is not permitted to be cross-examined as to prior arrests. An arrest is no disgrace. It happens in the best of families. There are a great many arrests which are unjust. It would be quite unfair to cross-examine a man and try to impeach him on that basis, so he must be impeached on crime either on the basis of actual conviction of crime or as admitting the commission of crimes for which he has not been convicted; but if, when he is asked if he committed

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a certain crime for which he has not been convicted, he says no, that ends it. That issue cannot be tried.

This is well settled, gentlemen, but it may remove a little puzzle that may be in your minds on account of the frequent wrangling that took place concerning the Court's rulings, wrangling which was entirely out of order and is not tolerated and not usually indulged in in most trials.

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But there is always a danger that when a witness is asked whether or not he did a certain disreputable thing, even though he says no, the jury may have a lurking idea that there was something to it or he would not be asked the question. I charge you to not have that lurking idea. You consider yourselves bound by the "No." You have to, in order to be fair.

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The sole reason why a previous conviction of a witness for crime is admissible is as having a bearing upon credibility. This applies likewise to admitted crimes or anything which has a bearing upon the likelihood of a witness's being a truthful man. The jury is entitled to know, is this a clean, honest man; has he a clean record; is he a good citizen, or is he a criminal; is he a man who has been convicted of crime; is he a man who, although not convicted, has been, by his own admission, guilty of other crimes, of wrongdoing, of grossly immoral acts; is he a man who has had prison contacts while a convict under confinement?

Please consider the interest of witnesses in weighing their testimony. In deciding who tells the truth and to what extent and what are the reasonable inferences from established facts, you have to consult your native intelligence as to

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motive for either wilfully false testimony or wilfully false coloration of testimony. This includes the question of self-interest. This is not limited to money interest. It may be interest based upon anything that stimulates a desire to testify one way or the other. It may be based upon gaining immunity from prosecution for crime; it may be based upon relationship, that is, kinship; it may be based upon marriage; it may be based upon friendship; it may be based upon official position. In short, it may be based upon a witness's interest, whatever it may be. There are such a multitude of things on the subject of interest that the Court leaves this entire question for the jury to determine. You will say whether or not a witness who has testified in the case has an interest, and, having such interest, whether or not he has been actually influenced thereby into giving false testimony and to what extent, or in giving testimony which is at variance with the truth, regardless of extent.

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If any witness testifies wilfully falsely on a material point, but not a collateral point, not a casual point, the jury has a right to throw out the witness's entire testimony as unworthy of belief, but only, as I say, if the testimony is, first, on a material point, and secondly, being on a material point, is wilfully false. Even though on a material point, if the falsification is not wilful, the entire testimony may not be thrown out. Truth is sometimes found in strange places. It is the jury's duty to search for it. Likewise, if the testimony is on an immaterial point, not a determining, but a minor point, then even though it be wilfully false, it does not warrant throwing out the entire testi-

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mony of the witness. In such event you will try to sift the wheat from the chaff; you will try to find where, if anywhere, there is truth, and be guided thereby, disregarding the false; so please be guided by that which you find to be true and reject that which you find to be false.

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Naturally, people remember some things more than others. We are not superhuman. The mind of the individual does not click with one hundred per cent accuracy. The outstanding things are those which tend normally to favor our observation and favor recording by the human mind. Nevertheless, in cross-examination, counsel have a right to go into matters of purely collateral observation and recollection, and this is more or less on the basis of memory test.

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In weighing the relative importance of accurate memory as directly related to the issue itself, as contrasted with memory of things not related, but only collaterally relevant, please put your brains to work in figuring out how much by way of observation and memory a human being of normal intelligence should be charged with. If errors of observation and recollection occur in matters which are purely collateral or of comparative insignificance which obviously fall short of being wilful falsification on material points, you are not justified in throwing out the witness's entire testimony as unworthy of belief.

Now, I want to take up a little matter with you. I heard it in the summation of one of the counsel, and I feel that I really should see that none of you is misled by it. Much was said about a foolish remark—it might better be characterized as a fool remark—by one of the

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witnesses to the effect that he had never told an important lie. I would not specifically allude to this if so much had not been made of it in the argument. I charge you not to let the decision of so important a case as this turn on a question of mockery or ridicule, I mean your reaction to mockery or ridicule, of a specific witness for a stupid answer such as that. This case is too important to be decided on the basis of ridicule. It must be decided on a basis of reason. I dare say there is not one of us who has not at some time or other made a foolish break which caused him to lose face due to the ridicule of others; but ridicule, gentlemen of the jury, is a childish trait. This case has to be decided by grown-up, serious men, who will decide it upon an adequate comprehension of the record. Ridicule is an emotional reaction. It works contrary to reason. It is a bad substitute for reason. It is primeval. That is why I say it is childish. It is something that appeals to and activates the immature mind, but does not and should not affect intelligent men whose minds are mature. Of course, like every other part of the record, that is something to be considered, but do not let it blind you to reason based upon all of the record of the case and all of the work of this trial. A stupid answer like that should not be the turning point. The case is far too serious.

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Something else was said in regard to an alleged failure of some witness to tell something to the Grand Jury that the witness testified to here, but, gentlemen, the Grand Jury is not a trial body. It may take only ten minutes to get enough evidence to get an indictment, but it

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may take ten weeks to get all of the evidence before a trial jury and get a decision as to the guilt or innocence of the accused. The failure to state facts concerning which the witness is not asked before the Grand Jury means nothing whatever. You will just disregard it. The only reason you are permitted to hear a witness cross-examined in regard to Grand Jury minutes is where he testified before the Grand Jury in contradiction of something that he testified to here.

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Bear that in mind. Don't be misled by that argument.

There has been considerable confusion in the argument, so far as your receptivities are concerned mentally, on the question of the housing of witnesses. Gentlemen, I charge you the District Attorney does not house those witnesses. The District Attorney has not charge of those witnesses. Those witnesses are in custody under a court order, which the jury may not question, because you don't know the reason why that order was made in each case, and I would not dare to tell you: I would not be allowed to tell you. Sufficient unto the judgment of the Court which had the facts before it, such orders were made because the Court deemed it to be a case where the witnesses should not be kept in the House of Detention or in prison. I am not permitted to tell you the reasons. They were not guests of any hotel, as alluded to by the summation. Don't fool yourselves on that. They could not come and go; they could not mingle with anybody; they could not go out to take a walk. They were prisoners, held under rigid guard. All of this argument about their having

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eaten fare provided by the hotel instead of fare sent up from Raymond Street Jail will be disregarded. They were held prisoners in the hotel, and, of course, they had to get their food in the hotel, in their rooms.

This practice is not novel to this case. This practice is taken from the manner inaugurated in the Dewey investigation in New York. I believe it was Supreme Court Justice McCook who had charge of that. We borrowed that practice and used it over here. In the Court's judgment it is sound, but I cannot tell you why. All I can tell you is to disregard it. Don't be fooled about all this stuff about beef steaks. In prison, the one who is confined gets his daily recreation, exercises in the corridor, but those who are confined in hotels cannot exercise in the hotel corridor. They are in their rooms twenty-four hours a day, but they have to be kept alive; they have to have exercise. The Court and those who are in authority under the Court and have the custody of these witnesses must provide them with reasonable exercise, and it is no more a sin to play baseball when held as a witness under a material witness order signed by the Court, than it is for the prisoners in Sing Sing to play baseball. That is in the interests of health and reasonable recreation. It is only in the event that you find, instead of being a hardship, the imprisonment in the hotel was a treat to such an extent that the witnesses were so entranced by it that they were persuaded to alter their testimony or color their testimony by reason thereof, that you will take any stock

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in this argument. Otherwise you were simply misled.

Now, gentlemen, I don't like to review testimony in a long record. I don't think it is humanly possible, with this enormous amount of text, for a judge to do this, no matter how fairly he tries to do so, without being accused of trying to color it.

11705

Just as with an anthology, any epitomization of record is terribly personal with the person who prepares the epitomization. I know it has to be done in some cases. I will do it if counsel for the defense request it. This has been a long trial. Witnesses have been put on in certain order. I don't know how much of the record you remember and how much you don't. A lot of it has been discussed in the summations from the viewpoint of counsel who argued. However, there are certain points of the evidence to which I feel under the necessity of calling your attention, first, because where more than one defendant is tried for a crime and the evidence is different as against the different defendants in its applicability, there should be some sort of an attempt at segregation by the Court as an aid to you otherwise you might apply evidence against one defendant as against the others, and that would be unfair. That is the purpose of this epitomization. Please do not gain any impression that it is warranted to be perfect. It is simply intended as a fair summary, and, I hope, a substantially accurate one.

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Also, I express no opinion as to the believability of any of the witnesses on any of the points mentioned.

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11707

Also, this particular summary is not a general one; it is merely a segregation of evidence to keep you from misapplying it as against certain defendants.

The believability of any witness on any of the points mentioned is your job to decide, and I do not go into details of cross-examination because that likewise is your job. These are references purely. Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss; it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute.

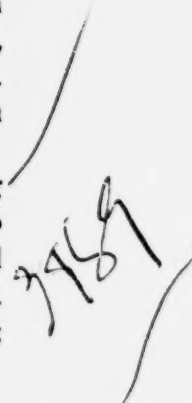
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Unless there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it.

Let me say at the outset of this, please scrutinize with suspicion and accept with caution and in a degree which accords with the character and extent of the impeachment, the testimony of each witness, and give due weight to all believable evidence put in by the other side which tends to contradict or discredit it. Then decide, if you can, is the witness telling the truth now. Put your brains to work on that, because you will need them.

11709

There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns state's evidence. It is a proper method of prosecution and enforcement of the law. When rogues fall out, it is a wise man's delight;



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so, while the Court submits to you consideration of the testimony of witnesses who, by their own admissions and otherwise are impeached as professional criminals, murderers, thieves, perjurers, in the long run it comes down to this: Are they telling the truth now? If you are not reasonably satisfied that they are telling the truth now, you may not accept and be guided by their testimony, but if you are reasonably satisfied, having viewed with suspicion and accepted with caution their testimony, taking into consideration its impeachment, then you will be guided by it.

11711

In segregating the points of evidence applicable to each defendant, we will take first the evidence which may be considered in relation to Buchalter. Gentlemen, this is very brief. It is only touching the surface, just the high spots. You have the testimony of Bernstein as to the alleged arrangements for the actual killing of Rosen. These depend upon the evidentiary value of the other evidence in the case in order to bring Buchalter in on the killing as a principal, under the provisions of Section 2 of the Penal Law, which I will now read to you again because you must keep this in mind and have a clear recollection of its provisions in order to follow what will come thereafter.

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"A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal."

The Charge of the Court

11713

I am not reviewing the testimony of Bernstein. I don't think I have to, but if it becomes hooked up by other witnesses with Buchalter, then all of the evidence as to the killing becomes applicable to Buchalter. As to this other evidence, in making this connection, we have the testimony by both Rubin and Tannenbaum, who I have charged you are not accomplices, about the alleged conversation between Buchalter and Rubin a few days before Rosen's death.

If I recall correctly, and, if not, I will be corrected at the proper time and I will reinstruct you, the alleged conversation was supposed to occur between Rubin and Buchalter with Tannenbaum walking in on them, noting Buchalter was excited and noting what he said. Buchalter is alleged to have alluded to Rosen's return to the city after being given money to go away, and saying, in part, that there was one so and so who would not go down to Dewey and talk about him and that this was the end of it.

11714

You may consider that, if that is true. What did it mean? Now bear in mind, according to my recollection, no hour of the day is stated as to when this alleged act took place, what part of the day it was. It may have come out on cross-examination, but, if so, it slipped my mind. There was evidence there that Rubin asked for another opportunity to straighten it out with a third party and was told that he could try; that he was told by Buchalter to send Berger to him, Buchalter; that he came back and reported his inability to straighten things out through the medium of this third party.

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In connection with this, you have Berger's testimony that he received such message from Rubin and that he responded to that message by going to see Buchalter; that Buchalter then took him to see Weiss on the East Side for the purpose of pointing out Rosen to Weiss, and that he did actually go with Weiss to Brooklyn and point out Rosen.

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In view of the fact that this was particularly discussed in reference to hour of the day, and it was argued by one of the counsel that inasmuch as the pointing out was at night, after dark, and the testimony by Bernstein as to the theft of the car and the hiring of the drop was during several hours of the day which preceded the pointing out, that that proved that the testimony did not hitch.

11718

Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day.

Taken in connection with the other facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit.

Apparently, in the argument that was offered, counsel assumed that Buchalter waited until

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after the fingering before he gave the instruction; but, under the record, I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. I don't say you have a right to draw an inference that he sent such an instruction over the telephone, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up, if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled.

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At page 1190 of Volume 2 of the record, the witness testified Lepke said to him:

“‘I have stood enough of the crap that you have been handing me. That so and so, that so and so is going around Brownsville and shooting his mouth off that he is going down to Dewey. Well, he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all.’” Then follows the protest: “‘I said, ‘Louis, don't be rash; don't be foolish; don't do something that will get us into trouble. I can straighten it out. He is harmless. Leave him to me.’”

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Reply: "‘No, I have stood enough.’" Further protest: "‘Let me handle it. I will run over to Murray Weinstein. I am sure that Murray Weinstein will do something about it. Give me a chance to straighten the thing out. Don't forget I was in the store in July.’ He said to me, ‘I don't care where you go. Straighten the guy out.’ I ran as fast as I could to Murray Weinstein."

11723

On page 1192: "Q. Did you go back and talk to Lepke after you had the talk with Weinstein? A. I did."

"Q. Relate that talk to the Court and jury that you had with Lepke after the visit to Weinstein. A. I said to Lepke—I come back from Murray Weinstein and I told Murray Weinstein that—I just don't know how to put it—

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"Q. Tell us the best of your recollection what you said to Lepke after you had the talk with Weinstein. A. I told Lepke that I went to Murray Weinstein and asked him to do something for me about Joe Rosen, and that Murray Weinstein said he can't do anything."

"Q. Did you say anything to Lepke about an invitation from Weinstein? A. I then told him that Murray Weinstein said I should not worry, that the Local 4 baseball team was playing a baseball game in Vineland, New Jersey, and that he invited me out there to attend the game. The game was to take place Saturday afternoon, which is September 12, 1936."

"Q. After you told Lepke that you could not get Weinstein to do anything, what did Lepke say? A. He said, ‘Go ahead to the game.’"

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"Q. Do you know a man named Paul Berger?

A. I do.

"Q. Is that Paul Berger the one whom you earlier in your testimony described as an intermediary between Lepke and the union? A. He is.

"Q. Was Paul Berger's name mentioned that Friday, September 11, 1936? A. He told me to get Paul Berger and send him up to him right away.

"Q. Did you go to see Berger? A. I did.

"Q. What did you tell Berger? A. I told him Lepke wants to see him."

11726

Now, gentlemen, in going over the text, those are the only questions and answers that I can find covering that point in the direct. It is possible that I have overlooked something that is in the cross. I will be glad to instruct you on that by a quote if my attention is called it, but, so far as the time element is concerned, you will note there is nothing there to indicate whether or not Buchalter had contacted in preparation, with the Brooklyn end, for the proposed murder before or after Rubin ran in on him and found him in that state and making those declarations, if that testimony be true—and please remember what the Court said to you about that—no speculation.

11727

You have also the testimony by Rubin that the day after the alleged murder he said to Buchalter, "Now I am in real trouble. I was there in July", and that Buchalter responded, "Brooklyn is all right. You have nothing to worry about."

You have also the testimony by Tannenbaum that a few days after the Rosen murder he saw

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Weiss and Buchalter together; that on that occasion Buchalter asked, "Is everything all right?" and that Weiss replied, "Yes, except as to Strauss, who shot Rosen after he fell on the floor", to which Buchalter responded that it was all right as long as a good job was done and they got away with it.

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This, of course, is applicable to both Buchalter and Weiss, but is not applicable to Capone. Bear that in mind. And, as you see, it makes direct reference, if true, to this specific murder and may, if you see fit, be found to be enough to connect up Buchalter with the actual murder, under Section 2 of the Penal Law.

11730

The evidence as to the later relations between Buchalter and Rubin, concerning Rubin's alleged flight with money supplied and under directions and from time to time alleged comments by Buchalter tending to show the applicability of the flight, are usable only as against Buchalter. They are not applicable as against Weiss and Capone. They are competent both as implied admissions and under the law as to spoliation of evidence by inducing a witness to flee and hide. This part of the evidence covers a large amount of detail. I trust you will remember it.

Rosen's murder is specifically mentioned in several of the alleged conversations. If true, that hooks it up, if in your judgment it is sufficient for that purpose.

Also in this connection you may consider the testimony by Rubin that his photographs were allegedly removed from his room as a precaution against police search and getting his photograph. I do not recall whether he went so far as to

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say the latter part. Also testimony by Rubin as to a misleading letter written by his wife to the Union on Buchalter's instructions, to the effect that there was a separation between the two. Also the use of false names and the facial disguise, in connection with the alleged instructions.

You may also consider as against Buchalter the alleged conversation during a rain storm, under an awning, in which, Rubin tells you, Buchalter asked his age, and on being told "Forty-eight" remarked, "That is a ripe age"

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Berger testifies likewise on many of these details. Rubin's testimony on those may be considered, if the jury sees fit, as corroborative of Berger's testimony. Berger, being an accomplice and Rubin being a non-accomplice.

Now, the actual shooting, or, I should say, alleged shooting of Rubin has not been carried by the evidence as far as Buchalter's door because that alleged shooting was in the fall of 1937, and you will recall Berger's testimony that as early as June of that year Buchalter told him that things were getting too hot and he was going to lam, after which he did not see Buchalter again.

11733

So far as the evidence is concerned, Buchalter drops out of the case as an entity beginning then until the time that he is arrested.

The particular so-called "lamming" has no evidentiary value because it has not been specifically connected with the Rosen murder and may therefore have been, under the rules of evidence, because of the Dewey investigation. You see, he did not say "too hot in Brooklyn";

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he just said "too hot". Therefore, under the rules of evidence, I must charge you that that particular "lamming has not been connected with the Rosen case and may not be considered as against Buchalter. It is insufficient anyway as evidence of flight. It is merely a declaration of intention.

11735

You may consider as against Buchalter the testimony of Rubin and Maguire and what was allegedly said to Buchalter about the legal inference of guilt from flight, following the alleged consultation between Maguire and Rubin in which the Brooklyn matter was discussed.

Counsel for one of the defendants asked him whether he found from the facts related in the conversation between himself and Rubin about the Rosen murder that Rubin was in any way hooked up with it. The District Attorney could not have brought that out. That was asked on cross-examination. Maguire said he did not find him to be hooked up.

11736

I was a little surprised that that was asked, but I charge you that that simply means that, as Rubin's attorney, Maguire expressed his judgment that he was not in effect an accomplice. I charge you that Rubin was not an accomplice under this evidence.

I also charge you that notwithstanding that Maguire gave that testimony under cross-examination, you should not consider it as having evidentiary value. The only reason I am charging you about it is to keep you from being misled by the answer and making a misapplication of the lawyer's alleged advice to a client or his opinion thereon.

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11737

You may consider against Buchalter the alleged reply by him to Maguire, "All I know is when there is no witness around there cannot be a case", or words to that effect.

The evidence as to Rubin's alleged flight and hiding is not applicable against either Weiss or Capone because they have not been shown to have had anything to do with it; but the later intended murder of Rubin a year later, if true, is applicable, as I have stated, against Weiss and possibly Capone.

11738

Berger's testimony is also applicable to Buchalter on the alleged events leading up to and causing the Rosen murder. Others who have testified for the People on this point are Rubin, Sylvia Greenspan, nee Rosen, and, very slightly, by Harold Rosen, and also by the decedent's widow. I shall not review this. It covers quite a ramified field, but I charge you as follows:

The testimony by members of the Rosen family as to the financial status of the business is too sketchy to have value as evidence. For that reason it has been stricken out.

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So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business apparently, and the grudge relating particularly to Rosen's severance with the business, and apparently blaming Buchalter for it, Buchalter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities.

11740

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That is enough as motive evidence, if you find these facts to be established to your satisfaction reasonably, but I charge you that motive need not be shown if the case is otherwise sufficient.

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When I mentioned Weiss and Capone, please bear strictly in mind what I said at the start, that this is purely a segregation to guide you against misapplication of evidence as against defendants to whom it does not apply. It is not a discussion of evidentiary values; it is not an expression of belief by the Court as to whether or not you shall accept such testimony as true. For that reason there is no review of cross-examination or of any of the evidence on the several defendants' side of the case. It is strictly and only a segregation.

11742

The testimony of Berger as to the alleged fingering of Rosen to Weiss, following the automobile trip from the East Side, New York, over to Sutter Avenue, is followed by the testimony of Bernstein as to Weiss's alleged active participation both in the preparation for and in the actual doing of the Rosen murder, also the escape.

You have Berger's testimony that a year later, about September, 1937—this is several months after Buchalter had dropped out of the scene, but after Rubin had returned to the garment district—that he, Berger, met Weiss, and Weiss said that he had information that Rubin was squealing and would "have to be hit", and that Weiss asked Berger to point out Rubin to Schlermer. He says he contacted Schlermer and finally Rubin; that about two months later he met Weiss, who said, "Look how lucky that so

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and so is. He was hit in the head but is still alive. We will catch up with him yet." He said that several months after this, Weiss asked him to point out Rubin to Magoon, saying, "The next time the so and so ain't going to be so lucky."

The alleged second fingering, according to this witness, was to both Magoon and Cuppie, but you are told that nothing came out of it because of police activity interfering. I shall not go into these details. They cover a substantial part of the record.

11744

About May, 1940, according to Berger, there was something in a newspaper about Tannenbaum. He said that he went to Weiss with the paper and talked to him about it, and Weiss said, "It looks like Allie is talking and I will have to duck." You have a right to consider that only as against Weiss and only as having a bearing upon the reason for the alleged flight to Kansas City and Colorado Springs, and only because it states as a reason that this was about Tannenbaum, and Tannenbaum, gentlemen, is a witness in this case, which is the Rosen case.

11745

The foregoing covers direct evidence which, if true, may be accepted by you as involving Weiss in the preparation and shooting, also in the attempted spoliation of evidence, also in declaration of intended flight; but, as to Bernstein and Berger, they being accomplices, you must see what, if any, other evidence there is from non-accomplices tending to connect Weiss with the commission of the crime. For that reason I have just charged you, in part, about the testimony by Rubin and by Tannenbaum.

11746

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Now, we will go further. Tannenbaum, who is not an accomplice, says that three or four days after the Rosen murder he saw Weiss and Buchalter together. I charge you this a second time because it has an application to a different point. Buchalter asked, "Is everything all right?" Weiss said, "Yes, except as to Strauss, who shot Rosen after he lay on the floor", to which Buchalter responded, "All right, as long as a good job was done and they got away with it." This, gentlemen, is applicable not only to Buchalter, but Weiss, but not to Capone.

11747

Tannenbaum then said he went to a coffee house with Weiss. There he had a conversation. He told you that Weiss told him that he had just got through with a piece of work himself and that he, Tannenbaum, said in effect, "Yes, I just heard you talking to Louis about it. Who is Rosen?" That Weiss's explanation was that Rosen had threatened to go down and tell Dewey about Louis.

11748

Now we come to Magoon, who is not an accomplice in the Rosen murder, and see what application his testimony has to Weiss. He says that he was told by Weiss about the fall of 1938 that Berger would finger Rubin; that this was allegedly in the presence of Capone, Strauss, and Reles. He tells how the alleged fingering was done and how he claims to have tailed Rubin, even to the use of a disguise as a laborer, but that he was frustrated by police activity. He said there were two more meetings with Weiss, Capone, Strauss, and Reles, when they went into a huddle—he used the word "huddle"—as he made his reports and received instructions.

• *The Charge of the Court*

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In one of these Weiss is reported to have said, "Then we will have to whack him and the cop."

Rubin, who is not an accomplice, testified that he was shot through the head in September, 1937, but this may be considered as against Weiss only and then only if found to be sufficiently connected with Weiss's alleged later declaration on this point, provided that declaration was true.

Magoon says that he had seen both Weiss and Capone in Buchalter's Company and had also seen Weiss in Farvel Cohen's company, but I charge you that these unrelated meetings are not connected up with the Rosen murder. At the most, they go simply to the matter of association of the individuals mentioned.

11750

Federal agents Aman, Bell, and Winne gave the evidence on Weiss's alleged flight and hiding following his alleged declaration to Paul Berger, about May, 1941, "It looks like Allie is talking and I will have to duck." I will not here review the details of that flight to the West and hiding. If you find that it occurred, you may accept it as evidence solely applicable to Weiss, not applicable to Buchalter and Capone, but applicable to Weiss only, provided that you find it to be motivated either wholly or in part by a desire to flee from arrest in connection with the Rosen murder and not from the Dewey investigation alone.

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On that point you have Agent Aman's testimony that Weiss said he "hated to sit between O'Dwyer and Dewey and that O'Dwyer had been in St. Louis trying to make a big shot of himself" about him—twice. Also that Weiss said

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he "had intended to surrender himself at a later date when O'Dwyer would be out of office."

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You may also consider, on the question of why Weiss fled and hid, if that be the case, Tannenbaum's testimony that he had talked to O'Dwyer's men and having thereafter testified before a Brooklyn Grand Jury in the spring of the year when Weiss made his alleged flight. Take that, if true, in connection with Berger's testimony, if true, that about May, when he showed a newspaper to Weiss, the latter remarked that apparently Albie was talking and he would have to duck.

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Now as to Capone— and please pay strict attention, gentlemen, on this point; it is quite important. In mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses so that you won't confuse the evidence applicable to the others and use it against Capone. Most of the evidence as against this defendant came from the accomplices Berger and Bernstein. Berger testified that when he rode with Weiss to Brooklyn for the purpose of fingering Rosen, Weiss first stopped the car for a few minutes at Sackman and Livonia, where he left the car and walked across the street and there talked to Capone. He did not hear what was said, but Capone and Weiss then re-crossed the street, where Weiss re-entered the car and drove to th place where Rosen was pointed out by the witness, but Capone was left behind. We do not know what was said and cannot speculate as to what

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11755

was said in the alleged interview between Weiss and Capone. It is valuable, if at all, only on the question of contact.

Sol Bernstein went into much detail as to Capone's alleged active participation in the alleged preparation for the murder, including several rehearsals of the escape route and in pointing out the Rosen candy store, saying, "Here is where somebody is going to be killed." Also that Capone was waiting with Bernstein's car the next day following the escape, and in the course of the alleged escape, on the other side of the foot-bridge over the Long Island Railroad tracks, and that Capone assisted in the escape, he, Capone, being first seated in Bernstein's car, which was a stolen car, but then getting out and riding in the other car with Cohen, Strauss, and Weiss, after telling Bernstein to take Ferraco in the stolen car.

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That is substantially Bernstein's testimony as to Capone, but, as I have told you, both Berger and Bernstein are accomplices as a matter of law and you must look to other evidence in the case to see if there is evidence tending to connect Capone with the commission of the crime outside of the evidence of these accomplices.

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Now, what is it? It comes down to Magoon. It depends on whether or not you believe that Magoon told the truth when he gave the testimony which I shall now refer to. If you believe he told the truth and you accept it as evidence tending to connect Capone with the commission of the crime, then it will be sufficiently corroborative, according to your finding, and you will then, if you accept the testimony of the

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accomplice witnesses in the light of this alleged corroboration, apply it against Capone.

If you do that, you will be entitled to convict, if there is no reasonable doubt in your mind as to Capone's guilt based upon that.

11759

Magoon testified that Capone was in the Weiss group which went into what he calls "huddles" at the corner of Saratoga and Livonia Avenues, when he received instructions in regard to the fingering and tailing of Rubin in the fall of 1938. According to this witness, the group consisted of Weiss, Capone, Strauss, and Reies. He says he met Berger at Ratner's Restaurant following this first huddle, or meeting. I should say, to go with him for the fingering. He says that usually Weiss did the talking, but once it was Strauss, on which occasion Capone took part by saying, "That Rubin is hurting Lep. We have got to hit him in the head and get rid of him."

11760

Magoon also testifies that in April, 1939, he went to Capone's residence and stated an objection to working on a matter which he called the Friedman matter, upon the ground that he himself hung out about a block away from Friedman's place, and that Capone replied, "What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made."

Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration. You will have to ask yourselves, "Is it true?" Possibly it would be better in view of the great importance of this feature of the case,

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11761

if, instead of depending on what I have just said, I use just a few minutes more and refer to the exact text of the record, because this must not be carelessly decided; it must be intelligently decided.

Volume 3, beginning at page 2327, we have this on the examination of Magoon:

"Q. What did the defendant Mendy Weiss say to you in the presence of the defendant Louis Capone, and Strauss and Reles? A. He says, 'Go to Ratner's Restaurant tomorrow morning and meet Paul Berger and another fellow. He will point out Rubin, Max Rubin, and you tail him and find out all his habits and see if he has a police bodyguard with him.'"

11762

Page 2330:

"Q. What else did Weiss say? A. He says, 'After you find out what is what, come back on the corner and we'll see what we have to do'—not in those words, but to that effect."

Then on page 2337, after Magoon testified to having followed Rubin all the afternoon, and the alleged fingering of Rubin, in which Berger said in connection with it, "Maybe it is the law."

11763

"Q. All afternoon did the man that you had seen with him on the corner when Berger whispered, 'Maybe it's the law,' or 'It is the law'—whichever he said—did that man remain with Rubin all afternoon? A. Yes, sir."

Further down on page 2338:

"Q. That night whom did you see at the corner? A. Weiss, Capone, Strauss and Reles.

"Q. Was there a talk on the corner between all of you? A. Yes, sir.

"Q. What was said at the corner that night,

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and by whom? A. Weiss spoke to me. He said, 'Tomorrow morning put on old clothes and here is Rabin's home address and go up there and watch his house, see who he comes out of the house with, how he walks over to the subway, who walks with him, and so forth.'

"Q. Now, when he said, 'Here is his address,' did he give you anything? A. Yes, sir.

"Q. What did he give you? A. An address.

"Q. Can you remember what the address was?

11765

A. It was some address on Gunhill Road.

"Q. In the Bronx? A. In the Bronx.

"Q. Was that said by Weiss to you in the presence of Capone? A. In the group.

"The Court: How close? We want to know if he could hear.

"The Witness: A foot away."

At page 2341:

"Q. Was anything else said in connection with what you were to do the next morning up at Gunhill Road? A. Yes, find out all his habits, I would say."

11766

At page 2342:

"The Court: What other clothes did you wear?

"The Witness: I wore overalls, a lumber jacket, old pants, a slouch hat, and he says, 'Use a pipe.'

"Q. Who said 'Use a pipe'? A. Weiss."

Further down:

"Q. And were you told that the night before?

A. Yes, sir.

"Q. And was that in the presence of Capone?

A. Yes, sir."

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11767

At page 2344:

"Q. Did you that evening go to a saloon? A. Yes, sir.

"Q. Do you know where that Saloon was located? A. On Grand Street.

"Q. East Side of Manhattan? A. Yes, sir.

"Q. Do you know the other street? A. I think it was Lewis Street.

"Q. Did you there at that saloon see one of the defendants? A. Yes, sir.

"Q. Which one? A. Weiss.

11768

"Q. Did Weiss ask you a question? A. Yes, sir.

"Q. What did he ask you? A. He said, 'What happened?'

"Q. Did you tell him? A. Yes, sir.

"Q. After you told him what had happened up there in the Bronx, did Weiss say anything else? A. Yes, sir.

"Q. What did he say? A. He says, 'Go back to Brooklyn and see Harry Strauss, and he will give you further instructions.' "

I am reading that, gentlemen, because that connects up and makes applicable to Weiss whatever Strauss said.

11769

"Q. Did you go back to Brooklyn that night? A. Yes, sir.

"Q. Did you go to the corner? A. Yes, sir.

"Q. Whom did you see at the corner? A. Strauss, Capone, and Reles."

Further down:

"Q. Tell us who spoke and what was said. A. Strauss spoke and he said, 'What happened up there?'

"Q. Was this in the presence of Capone and Reles? A. Yes.

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"Q. Were you all close to one another when you were talking? A. Yes, sir.

"Q. State where you were in proximity to one another. Do you know what that means? A. Yes, sir.

"Q. All right, tell us. A. About arm's length away from one another.

11771

"Q. Continue to tell us what was stated there. A. He asked me, 'What happened up there?' and I explained to him exactly what happened. He says, 'Well,' he says, 'go up there again tomorrow morning and watch him again and stay around there until about 7:30 and see if he comes out of the house after supper; if he does come out of the house, where he walks to and with whom.'

"Q. At that time did Capone say anything? A. Yes, sir.

"Q. What did he say? A. He says, 'That Rubin is hurting Lep, and we got to hit him in the head and get rid of him.' "

At page 2349:

11772

"Q. What did you tell Weiss? A. I told him once more that he has a guard with him at all hours, at all hours that I was there; he walks out of the house with the guard and back into the house with the guard; he has the bodyguard with him at all times.

"Q. Had you ever seen Rubin leave the house by himself? A. No, sir.

"Q. And from your observation of him, had he always been with the bodyguard every time that you saw him? A. Yes, sir.

"Q. When you told that to Weiss, that he was always in the company of the cop or the body-

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11773

guard, what did Weiss say? A. He said, 'Then we will have to whack him and the cop.'

"Q. After Weiss said about what would have to happen to Rubin and the cop, did you say anything about the incident of the policeman? A. Yes, sir.

"Q. What did you say? A. I explained what happened, that I was stopped up there that morning and questioned off a cop.

"Q. Did you tell them what the cop asked you? A. Yes.

11774

"Q. And did you tell him what you said to the cop? A. Yes, sir.

"Q. How close together were you, Mendy Weiss, Capone, Strauss, and Reles, when this talk went on? A. All in a huddle.

"Q. And were you in a huddle when Weiss said about watching Rubin and the cops? A. Yes, sir.

"Q. And were you in a huddle when you made your report as to what you had seen up in the Bronx in connection with Rubin and the cop? A. Yes, sir.

11775

"Q. Tell us what you said in that huddle to them in relation to your experience with the uniformed police officer that stopped you and questioned you."

That question was revised.

"Q. Tell the Court and jury what you said about that incident. A. I told him that as I was sitting on the curb a police officer walked over to me and he saw me sitting there, and says, 'What are you doing here?' I says, 'I am a plumber and I work upstairs and I am waiting

11776

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for my boss.' So he says, 'Well, leave it go for a while, drop it for a while.'

"Q. Who said, 'Leave it go for a while,' then?
A. Weiss."

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Gentlemen, I think that is the text applicable thereto, unless there was something on cross-examination applying to it. You see how it is limited down. It is limited down on corroborative points to what Magoon, the non-accomplice witness, said was his conversation with Capone in which he alleges Capone made reference to the Rosen matter and that he had not been made, and then you have the alleged complicity, according to the testimony I have just read, testified to by Magoon, who is a non-accomplice witness. These are two non-accomplice witnesses.

11778

If you believe that testimony, and it is for you to say whether you believe it or not, then you may ask yourselves is it sufficient as tending to corroborate Berger and Bernstein. If it is, you may convict. If you do not believe it, or, believing it, you don't deem it sufficient as tending to connect, you will have to acquit Capone, because if Capone was in a huddle there and was a conspirator in the proposed trailing or tailing of Rubin for the purpose of another attempt at assassination, then that may be used as evidence of guilt on the part of Capone.

But, please do this fairly, honestly, and intelligently.

Now, gentlemen, just a word of caution: Remember that I told you brains shall decide the case. It is hoped that there will be no stubbornness creating a closed door of prejudice when

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11779

you retire. The jury is presumed to, or at least should, use good judgment in determining what are seeds of truth and to pick them out and check up on the story. See what there is which you believe that tends to connect these defendants with the commission of the alleged crime, from witnesses who are not accomplices, provided the crime itself is made out and provided the proof be beyond a reasonable doubt. I have charged you as to the meaning of that. As reasonable men, you should know it. That is what you have to do.

11780

The Court will read to you a certain section of the law. It is Section 393 of the Code of Criminal Procedure of this State. The Court is not permitted to comment on that statute. The furthest it may go is to read it to you and then keep still about it.

"The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him."

We are not concerned with the question of the policy of the prosecutor's office. It is an unfortunate thing that in the administration of criminal justice, criminal courts may from time to time deem it necessary to use the testimony of accomplices under either expressed or implied promise, hope, or expectation of reward of some kind by reason thereof. This is a tool used at times in the administration of criminal justice. You can see that there may be cases where a notion of necessity may activate the use of testimony of accomplices. Just what the wisdom or lack of wisdom may be on the part

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of the prosecuting official in taking the testimony of accomplices is his responsibility. It is not for the Court to judge it; it is not for you to judge it. The prosecutor's office is not on trial. What you have to do is to use your intelligence in determining what, if any, seeds of truth are there. Use them if you find them. See what proof there is. Scrutinize it carefully.

11783

Just a word of caution. Remember what the Court said about the real purpose, as far as the Court can disclose, of witnesses being housed elsewhere than in the jail. Do not concern yourselves with that unless you find, as I say, that it went to such an extent as to be deemed by the witness not a hard deal but a luxury and therefore persuasive, and as being a sensible reason for actuating false testimony here on the stand against these defendants.

11784

Now, in every-day life you are called upon to decide who tells the truth and to what extent and what are the reasonable inferences from established facts. You have little difficulty many times in so determining. You have constantly to say who tells the truth and to what extent. Use your native intelligence in so determining in this case. The common sense and judgment you use in every-day life is a fair cross-cut of what is believed to be more than normal intelligence in a jury of twelve selected here. You have to determine that question.

The administration of criminal justice is not pleasant. It is a task. It is a strain on those who are charged with its administration. This trial has been a strain on all of us. It is par-

The Charge of the Court

11785

ticularly a strain on the jury, because the jury has not the opportunity or experience that those who are engaged in that line every day have. It is a responsibility of doing justice and doing it accurately. It is the responsibility of finding the truth and then announcing it, regardless of which way it hits.

If, under the strain of this trial, there has been any evidence of nervousness or strain on the part of counsel or Court, if there have been interchanges which may have shaken the decorum of the court-room, if there have been arguments and recriminations which may seem unnecessary, please overlook and disregard them in coming to your verdict. This includes the Court. The Court is human. It has to be strict, in accordance with the responsibility of its job, whether it likes to be strict or not, but if I have spoken sharply at any time, just forget it. The Court is trying to be fair. It is trying not to express any opinion or to give any impression as to what its own action is concerning the guilt or innocence of any of these defendants. It is trying to see that the case is kept within reasonable bounds, although it has given a great deal of latitude in this trial. It is trying to see that the jury has it fairly and fully presented as a case so that it may properly decide it.

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11787

I charge you that the law presumes every defendant innocent unless proven guilty beyond a reasonable doubt, the language of the statute being:

"A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt

11788

The Charge of the Court

whether his guilt is satisfactorily shown, he is entitled to an acquittal."

Gentlemen, a reasonable doubt is not any doubt; it is not a foolish doubt; it must be reasonable. It must be a doubt that is reasonable, existing in the mind of a man who has brains sufficient to be properly applied to the trial and determination of the issue. You have brains. Please apply them soundly, sensibly, and accurately.

11789

If you find that the case has not been proven against the defendants or either one of them beyond a reasonable doubt, return a verdict of not guilty as to such defendant or defendants.

But if you find that guilt has been proven beyond a reasonable doubt as to any or all defendants, you will find such by your verdict.

It will be separate as to each, as instructed. Obviously, it will have to be the same degree as to each, in the event of conviction of more than one, because it is just one crime and can be only one degree. It would be either—that is, in the event of finding the defendants guilty, or any of them

11790

Guilty of Murder in the First Degree, as to such as are guilty, or

Guilty of Murder in the Second Degree, or

Guilty of Manslaughter in the First Degree, or

Guilty of Manslaughter in the Second Degree, but bear in mind that if the crime was committed, the nature of the conviction, provided the crime was committed by the defendants or any of them, must correspond with the evidence as to how the crime was committed and as to whether or not, in the event of murder being

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11791

shown, there was premeditation and deliberation. In the latter event it will be Murder in the First Degree—nothing less.

Now, gentlemen, it is about half past six. I don't want to confuse requests to charge with the charge as just concluded. I am going to have a brief recess before listening to requests, and I think you will be glad to have it.

Please do not discuss the case, because in a little while you are coming back here. I will pass on requests, and after that you will go out and decide the case. First you will get your dinner. The jury may retire.

11792

Mr. Talley: Judge, may I suggest that you take a recess for dinner? You have been charging for three hours, and the requests and exceptions will be a couple of hours. I merely make the suggestion that I think it would work out very much better if we could go out now and get some dinner and come back in an hour. The exceptions and so forth will take a considerable length of time. There are three of us.

The Court: All right.

11793

(To the jury) Do not discuss the case; let nobody talk to you about it. Keep your minds open. Dinner will be provided.

We will reassemble in just one hour, at half past seven.

Defendants are remanded.

(RECESS)

11794

Requests to Charge and Exceptions

EVENING SESSION

(Trial Resumed)

The Court: I will hear for defendant Buchalter first. May I suggest that you speak slowly and clearly. I will have a better chance to think and follow your requests.

Mr. Climenko: I understand your Honor desires requests first?

11795

The Court: Yes, because the exceptions involve reconsiderations of questions on the record, that may involve discussion.

Mr. Climenko: May it please your Honor, the Court is respectfully requested to instruct the jury that at no time in a criminal cause is it incumbent on a defendant to prove his innocence, but that at all times it is incumbent on the District Attorney by competent proof to prove the guilt of the defendant beyond a reasonable doubt before the jury can convict.

The Court: So charge. That is already charged. I charge it the second time.

11796

Mr. Climenko: I respectfully request your Honor to charge the jury that the burden of proof is always on the prosecution and never shifts to the defendant.

The Court: That is already charged. I charge it the second time.

Mr. Climenko: I respectfully request your Honor to charge the jury that there is no proof in this case that the defendant Buchalter abandoned his defense or failed to call any other witness.

The Court: I so charge. I will put it in this

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form: No matter what you may think on the subject, it has no evidentiary value. You will dismiss it from your minds.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the jury may draw no unfavorable inference because of the defendant's failure or neglect to call any particular witness.

The Court: I so charge.

Mr. Climenko: I respectfully request your Honor to instruct the jury that each defendant is presumed to be innocent and that the presumption of innocence is evidence in his favor and is with him right now.

11798

The Court: Yes, it has probative force and continues until and unless, upon all of the evidence being in, the jury is satisfied beyond a reasonable doubt as to the defendant's guilt. I so charge.

Mr. Climenko: May I respectfully request your Honor to charge the jury that any charge now given, in response to a request, becomes a part of the charge with the same effect as though originally charged by your Honor in the main charge.

11799

The Court: I so charge; only try to avoid repetition so that the jury can get upstairs; it is so late. May I ask, in the meantime, Mr. Rosenthal—

Mr. Rosenthal: Yes, your Honor.

The Court: Will you look over your written requests and cross out those that you think are sufficiently covered?

Mr. Rosenthal: I am doing that.

Mr. Climenko: I respectfully request your

11800

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Honor to instruct the jury that if any juror is satisfied upon his own conscience, from the evidence adduced in the case, that there is a reasonable doubt as to the guilt of the defendants, or any of them, it is that juror's duty to vote for an acquittal unless such doubt is removed by discussion with the other jurors upon the evidence adduced on the trial, and that only, and that the juror should not change his opinion and must vote for the acquittal of the defendant Buchalter, or other defendant so affected, as to whose guilt he believes there is a reasonable doubt.

11801

The Court: That is so, except this, that he does not have to be persuaded. He may change his mind of his own volition.

Mr. Climenko: That is right.

The Court: He may change his viewpoint. So charge, otherwise.

11802

Mr. Climenko: I respectfully request the Court to charge the jury that the testimony of an accomplice is not to be weighed or considered or judged in the same manner as the testimony of other witnesses, but that it is to be viewed with suspicion and subjected to careful scrutiny and caution, and that in weighing the value of the testimony of the accomplice, the juror must consider any inducement held out to him for his testimony.

The Court: I have already so charged. I charge it again.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the fact that a homicide occurred and that Rosen was the victim in and of itself is not to be considered as

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proof or even as the basis of a suspicion that the defendant Buchalter conspired to cause that homicide.

The Court: That is obvious. So charge.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the physical facts proved in this case do in no wise connect the defendant Buchalter with the commission of the crime and that the jury may not consider the physical facts proved as corroboration of the testimony of any accomplices.

11804

The Court: You mean the physical facts attending the killing?

Mr. Climenko: That is right, your Honor.

The Court: So charge.

Mr. Climenko: I respectfully request your Honor to instruct the jury that one accomplice cannot corroborate the testimony of another accomplice.

The Court: I will modify it in this respect: He may not corroborate it, standing alone, to an extent sufficient to entitle the jury to accept the other accomplice's word. The corroboration by outside testimony which tends to connect the defendant with the commission of the crime must come from a non-accomplice, but the testimony of every accomplice witness, other than as aforesaid, may be considered by the jury for what probative value it is worth, but not as sufficiently corroborative to accept another accomplice's testimony.

11805

Mr. Climenko: I respectfully request your Honor to instruct the jury that in evaluating the credibility of the witness Rubin, the jury may take into consideration his own past admitted criminal activities for which he has gone

11806

Requests to Charge and Exceptions

unpunished, his hope of reward, his prior perjury, and his criminal evasion of military service in 1917, and his motive and his desire for revenge.

The Court: If I recall correctly, Rubin's criminal activity was as a graft collector, that is, an extortionist in the trade, for some alleged group, with which he has mentioned Buchalter. Now, what was the rest of that? He did not admit participation in any murders or other crimes that I can recall. The testimony, if I am correctly quoting, is that he waived immunity, so he gained no immunity. What is the next part?

11807

Mr. Climenko: I was referring, if your Honor please, to the fact that he admitted that he had committed perjury in or about 1919, and also his criminal evasion of military service in 1917.

The Court: One thing at a time. What was that perjury in 1919?

Mr. Climenko: At that time, if your Honor please, he knowingly perjured himself in the obtaining of a passport under the name of a member of his family rather than his own name.

11808

The Court: Yes, I charge you you may consider that for what, if anything, it is worth.

The next was what? Failure to report for the draft. You may consider that for what, if anything, it is worth as having a bearing on credibility.

Mr. Climenko: And his own admission, if your Honor please, that he has never been punished or even arrested for any of the crimes which he admitted, including the extortions which he admitted he participated in.

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The Court: That does not mean anything yet. If he is getting immunity from the extortions in consideration of his testimony, you may consider that for what, if anything, it is worth.

Mr. Climenko: Well, specifically, if your Honor please, I respectfully request your Honor to charge the jury that he did gain immunity by virtue of the testimony he gave in that case.

The Court: Would you mind telling me in what respect?

Mr. Climenko: He gave testimony in that case, such as the proof in this record, your Honor, by reference to the other record.

11810

The Court: What case is that?

Mr. Climenko: The flour extortion case in New York.

The Court: I don't recall the evidence on that point.

Mr. Climenko: Well, if your Honor please, he was asked whether he had not testified against Buchalter in a prior case. He said that he had, and he said that he testified in that case.

The Court: That does not apply to this case. Decline to so charge.

11811

Mr. Climenko: Exception.

I respectfully request your Honor to charge the jury that if the jury believe that the witness Rubin fled from the Dewey investigation in the Borough of Manhattan, then his flight or the fact that he had been induced to flee by the defendant Buchalter cannot be considered as evidence against the defendant Buchalter as a consciousness of his guilt in the Rosen case, and on that point they must consider his statement to Assistant District Attorney McCarthy

11812

Requests to Charge and Exceptions

on December 10, 1937, to the effect that he fled, but not on account of the Rosen case.

The Court: I charge the jury in this form, and I have already charged it. There is evidence here on which the jury can find that one of the causes, at least, was the Brooklyn case, the Rosen case. There is evidence there that the jurors' attention has been called to. On the second point of that request, he did not testify before McCarthy at all. He was not under oath. I decline to so charge.

11813

Mr. Climenko: I respectfully except, your Honor.

The Court: That is not perjury. That is a contradiction, and he has explained it. He says he had been shot once through the head because of testifying before the Dewey Grand Jury, and he was afraid to give McCarthy any information about the Rosen case for that reason.

Mr. Climenko: I respectfully except to your Honor's observation, and I now respectfully request your Honor—

11814

The Court: I charge the jury that they can consider the explanation in connection with the apparent evasion on that point before McCarthy. If it was on the basis of fear, they can consider the extent, if any, to which it ameliorates the contradiction and whether or not the contradiction and evasion, admittedly so before McCarthy, really amount to anything at all. He was under no obligation to give any evidence—it was not evidence; it was not sworn to before any official, so far as legal procedure is concerned; it was not compulsory.

Mr. Climenko: I now respectfully request your Honor to instruct the jury that, by the

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concession of the District Attorney, in the trial of this case no point was made about the fact that that statement made by Rubin in the presence of Assistant District Attorneys Hogan and McCarthy was not signed or was not sworn to, and I respectfully request your Honor to instruct the jury that it is for them to decide whether Rubin then spoke the truth when he made that statement, and that, in deciding his credibility at that time they may consider the fact that he was then under triple police guard and that the statement was made in December, 1937, after the Grand Jury testimony which he said he gave in August, 1937.

11816

The Court: I do not know whether he was under triple police guard or not, but he says he was afraid to tell McCarthy what he claims was the truth and what he claims he is telling here is the truth. It is up to your common sense to decide if it is worth anything by way of contradiction or impeachment. Otherwise I decline to charge as requested.

Mr. Climenko: Exception.

11817

I respectfully request your Honor to charge the jury that in this connection they must consider the testimony of Rubin himself that the authorities of Brooklyn, both the police and the District Attorney, never looked for him, and the further fact that he and his counsel—

The Court: Never what?

Mr. Climenko: Searched for him, sought him.

The Court: He does not know whether they did or not.

Mr. Climenko: No, if your Honor pleases, as I understand the record he said they did not, neither the police nor the District Attorney.

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The Court: Pay no attention to that. He does not know what the police do behind his back. He is not the Police Commissioner. I decline to so charge.

Mr. Climenko: Exception. I respectfully request your Honor to instruct the jury in that connection that, as to that, they may take into consideration the further fact that Rubin and his counsel concluded that Rubin had not done anything in the Rosen case for which he had reason to flee.

11819

The Court: I charged the jury on that point for a particular reason. I wanted them to avoid confusion that would arise if I charged them in the form you request.

Mr. Climenko: I respectfully except.

11820

The Court: He did not say that at all. He could not say what was in Rubin's mind by way of fear of being apprehended and falsely accused. The most that the attorney could advise him, and that is as far as this goes, is that upon the statement of facts made by Rubin to the lawyer that Rubin was not responsible for the Rosen murder, he should not flee because that would be evidence of guilt; the best thing he could do would be to go back to the garment district and resume his old occupation and forget it. I am not saying that that is in the evidence, but I think that request is so confusing I have to clarify the situation because I saw what counsel was driving at when that point came up in the course of the trial, and I anticipated just this thing. I decline to charge other than I just have charged on that point.

Mr. Climenko: Exception. I respectfully re-

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quest your Honor to instruct the jury that if the jury entertain a doubt as to which jurisdiction Rubin fled from, either the Dewey investigation or the Brooklyn investigation, then and in that event they must completely disregard Rubin's testimony with respect to flight.

The Court: I decline to charge in that form. I will charge in this form:

Gentlemen, there is evidence that I called your attention to and there is evidence which you remember which, if true, directly connects flight with the alleged Rosen murder fear and also on instigation from Buchalter because of the Rosen murder. If there was another cause, that does not lessen it. It is enough if the Rosen murder was one cause, and only in event that you are not satisfied beyond a reasonable doubt that the Rosen murder and fear in connection therewith and instructions in connection therewith from Buchalter were in part connected with the flight, may you disregard that evidence.

11822

Mr. Climenko: I respectfully except to your Honor's comment. I respectfully request your Honor to instruct the jury that in determining the reason which prompted Rubin to flee, it must consider his testimony and that of the witness Maguire that when Rubin voluntarily surrendered in August of 1937, he surrendered to the District Attorney's office in Manhattan and he was never surrendered to the Brooklyn District Attorney's office.

11823

The Court: I decline to so charge.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury on that same subject of the flight of Rubin that the jury may consider his own tes-

11824

Requests to Charge and Exceptions

timony as to when he fled and as to why he fled, as given in the flour case in New York.

The Court: A little more slowly and clearly.

Mr. Clinenko: I respectfully request your Honor to instruct the jury that in considering the question of Rubin's flight the jury may consider Rubin's testimony as to why he fled, as he gave that testimony in the flour case and which testimony he admitted in this case.

11825

The Court: They may weigh that for what, if anything, it is worth on the question of impeachment only.

11826

Mr. Clinenko: I respectfully request your Honor to instruct the jury that if the jury believe the witnesses Rubin and Sylvia Greenspan in so far as their testimony relates to a meeting alleged to have been held in the summer of 1932, on 17th or 19th Street in Manhattan, and that on that occasion the defendant Buchalter used or attempted intimidation by threats against Rosen to force him from business, then Buchalter's act on that occasion constituted a violation of Section 530 of the Penal Law, which was a misdemeanor, and it was outlawed by the Statute of Limitations after two years, and therefore the defendant Buchalter could not be prosecuted for this crime after the summer of 1934 and that he could not have been prosecuted for it by the Special Assistant to the District Attorney of New York County, Thomas E. Dewey, for the reason that Mr. Dewey did not become such Special Assistant District Attorney until sometime in July, 1935.

The Court: I decline to so charge.

Mr. Clinenko: I respectfully except.

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I respectfully request your Honor to instruct the jury that evidence of mere association of the defendant Buchalter with alleged co-defendants, at a time before or after the commission of the crime, is not sufficient proof on which to predicate a verdict of guilty.

The Court: I so charge.

Mr. Climenko: On that same subject, may I respectfully request your Honor to read to the jury Section 530 of the Penal Law with respect to the one before the next preceding request?

11828

The Court: Declined.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that if the proof tendered against the defendant Buchalter is largely circumstantial and that if the jury find that such circumstantial proof is consistent with innocence, it must acquit the defendant Buchalter; and that if the proof is susceptible of more than one inference, the jury must draw that inference which is most favorable to the defendant Buchalter and that the jury may find that defendant guilty only of the circumstances are such as to exclude by a moral certainty every hypothesis except that of guilt.

11829

The Court: I will charge it in this form: that any evidence by way of circumstance must, in order to be applicable, point only to guilt. A person may do something which may have an innocent interpretation and may have a guilty interpretation. You may not be able to decide as to which interpretation applies, so I charge you, when the alleged circumstance is capable of interpretation on either a hypothesis of in-

11830

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norence or guilt, that the defendant is entitled to the benefit of the hypothesis of innocence.

Mr. Climenko: I respectfully except.

I respectfully ask your Honor to instruct the jury that mere association by the defendant Buchalter with alleged co-conspirators is not proof in any degree that the defendant entered into a conspiracy to commit the crime charged.

11831

The Court: No, you cannot base a case on association alone. That is only just a part of a case. It just stands on its own bottom. It is evidence of association, that is all, to be applied in connection with other evidence as the common-sense requirements of the case indicate.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the character of the defendant Buchalter's associates and the reputation of the defendant Buchalter are not issues in this case and that his association with persons of good or bad character is not proof in any degree that he committed any crime.

The Court: I so charge.

11832

Mr. Climenko: I respectfully request your Honor to charge the jury that the statement of the witness Magoon, even if believed, to the effect that the defendant Capone said, "We got to hit Rubin because he is hurting Lep," is in no way binding on the defendant Buchalter and the jury must completely disregard it as to him.

The Court: I have already so charged. I charge it again.

Mr. Climenko: I respectfully request your Honor to instruct the jury that evidence corroborating the testimony of an accomplice must tend to connect the defendant with the commission of the crime charged and not merely con-

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nect the defendant as an associate or an acquaintance of the person said to have committed the crime.

The Court: That is ordinary common sense. I so charge. If you convicted everybody of crime who happens to meet a confessed criminal, there would be very few people out of jail.

Mr. Climenko: I respectfully request your Honor to instruct the jury that the failure of the District Attorney to call any representative of the Dewey office or of the Police Department to show the surveillance by those authorities of the defendant Buchalter on September 11, 1936, that there has been such a failure in this case, and that they may infer from that failure to call such witnesses that if they were called those persons would have given testimony favorable to the defendant Buchalter.

11834

The Court: Oh, no. There is nothing to indicate that such witnesses should reasonably have been called. Declined.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that if the jury believe that Rubin told the truth to Assistant District Attorney McCarthy, it must acquit the defendant Buchalter.

11835

The Court: Obviously, gentlemen, if you don't accept Rubin's testimony that he shied off on McCarthy because he had been shot and was afraid, if you really believe his answers to McCarthy, his statements to McCarthy, that impeaches his testimony. I won't charge you that you can go so far as to acquit. That only goes to his credibility. Unless counsel calls my at-

11836

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tention to a specific part and lets me read it, I will have to let this specific charge stand just as it is.

Mr. Climenko: Your Honor, I do respectfully call your attention—

The Court: If you have the exhibit, pass it over and point out—

Mr. Climenko: We do not have the exhibit, but we do have the testimony.

The Court: What page?

11837

Mr. Climenko: Beginning at page 2282.

The Court: All I have in my notes is, in December he was questioned by McCarthy of Mr. Geoghan's staff but failed to disclose that he had been in flight and hiding because of the Rosen murder and failed to disclose any of Lepke's alleged connections with that crime. In these and in other ways the statement is inconsistent with his testimony here. He explains these inconsistencies by stating that they were due to fear because of having been shot following his secret testimony before the Dewey Grand Jury. Refer me to the page.

11838

Mr. Climenko: Page 2290 in the testimony of November 14th.

The Court: What question and answer?

Mr. Climenko: The first question from the top of the page, your Honor.

The Court: "Q. Is it not a fact that in that statement you, on the other hand, went out of your way to give assurance to the Assistant District Attorney then that if you could implicate Lepke you would? A. Where did you get that inference from?"

Mr. Climenko: The question is finally answered at the bottom of the page.

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11839

The Court: "A. I did."

I think "out of your way" is improper in form. What is the request in connection with that? All I can see in that is an attempted concealment, which is quite consistent with his explanation of fear.

Mr. Climenko: I except to that, in your Honor please.

The Court: I am trying to figure out how I am justified in charging as you request. Will you repeat that?

Mr. Climenko: I will repeat the request which I have submitted to your Honor, that if the jury believe that Rubin told the truth to Assistant District Attorney McCarthy, it must acquit the defendant Buchalter.

11840

The Court: No, I decline to so charge.

Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that in determining the truth of Rubin's story they must consider the date when Berger was arrested, which was June 5, 1941, and the date of Tannenbaum's arrest.

The Court: I don't understand it, frankly.

11841

Mr. Climenko: May I explain it to your Honor?

The Court: Yes.

Mr. Climenko: Rubin said that he told the truth in March, 1940, to a police official by the name of McDermott and to Judge O'Dwyer. Berger was available at all times until the date of his arrest, but that did not happen until June 5, 1941. Tannenbaum was not questioned about this case.

The Court: No, no, I decline to so charge. That is quite out of place.

11842

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Mr. Climenko: Exception.

I respectfully request your Honor to instruct the jury that if the jury believe that there is one or a single reasonable doubt arising out of the evidence as to the guilt of the defendant Buchalter, they must resolve that doubt in favor of the defendant Buchalter and acquit him.

The Court: I have already charged thoroughly on reasonable doubt. I don't see why I should keep on repeating.

11843

Mr. Climenko: I respectfully except.

Mr. Cuff: I have a few requests to make on behalf of the defendant Weiss. I ask your Honor to instruct the jury that the testimony of the People's witness Berger, cannot be considered as corroborating the testimony of the accomplice Bernstein.

11844

The Court: That comes under the charge and also the request heretofore made. It may not be sufficiently corroborative. It is not sufficiently corroborative, standing by itself, to permit conviction. Both of them have to be sufficiently corroborated under the accomplice statute by one or more non-accomplice witnesses. One is enough, if you consider that sufficient, and the corroboration is required to go only to the extent that it tends to connect that defendant with the commission of the crime. It does not have to go into each and every detail. Otherwise denied.

Mr. Cuff: I respectfully except to your Honor's refusal to charge as requested and to the comment and charge as qualified by the Court.

I respectfully ask your Honor to instruct the jury that if, upon the considering the testimony of People's witness Bernstein, they have a rea-

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11845

sonable doubt as to its truth, they must acquit the defendants.

The Court: That is too broad. He testified on many points. It all depends. If you have a reasonable doubt as to whether any of it is true, then you must acquit. Obviously, if you have a reasonable doubt as to whether any of it whatever is true, you have to throw it all out.

Mr. Cuff: May I respectfully except to your Honor's denial of the charge in the language requested and to the qualification made by your Honor?

11846

The Court: Yes.

Mr. Cuff: I ask your Honor to instruct the jury that if, upon considering carefully the testimony of People's witness Tannenbaum, they have a reasonable doubt as to its truth, they must acquit the defendant Weiss.

The Court: Not the truth of any one part. If they have a reasonable doubt as to the truth of all of it. If you distrust all of it, sensibly throw it all out.

Mr. Cuff: May I respectfully except to your Honor's refusal to charge in the language requested and to the qualification of the charge as made.

11847

I ask your Honor to instruct the jury that the defendant Weiss does not have the burden of proof as to the defense of alibi.

The Court: Oh, gentlemen, I knew there was something I forgot, and, really, I must apologize. This is in perfectly good faith. I think we are all so tired that I sort of faltered towards the end of the charge. Supposing I charge you as to alibi:

11848

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First, no defendant is obliged to prove an alibi, but when he undertakes to prove it, it is up to the jury to decide whether or not it is true. Obviously, if the alibi is true, then he was not where it is claimed he was but, if the alibi is untrue, it does not amount to anything. You are the judges of the facts and will say whether it is true or untrue. The evidence on that point runs into quite a large part of the record.

11849

Mr. Cuff: May I respectfully except to the charge which your Honor has just made and to the refusal to charge in the language requested. May I also ask your Honor to instruct the jury that if the proof as to the alibi, taken in connection with all the other proof, raises a reasonable doubt as to the defendant's presence at the place of the crime, the jury must acquit the defendant Weiss.

11850

The Court: You mean even if the alibi is not believed? If the alibi is believed, you don't have to go any further. If you believe the alibi, you don't have to go any further, gentlemen; just throw out Weiss, let him go; but if you don't believe the alibi, that is a different story. I decline to charge in that form.

Mr. Cuff: May I except to your Honor's refusal to charge as requested and to the qualification of the charge as made?

The Court: Yes.

Mr. Cuff: I ask your Honor to charge the jury that an alibi need not be established beyond a reasonable doubt, but that, when established to the satisfaction of the jury, it is as conclusive a defense as can possibly be interposed.

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11851

The Court: That is right, if it is true, if the witnesses told the truth. I so charge.

Mr. Cuff: I respectfully except to your Honor's refusal to charge in the language requested and to the comment and qualification made by your Honor.

I ask your Honor to instruct the jury that in passing upon the credibility of any witness they may take into consideration all the crimes which the witness admitted that he has committed, whether he was ever arrested or convicted for them or not.

11852

The Court: I have already so charged on that point, but I will charge it again.

Mr. Cuff: I ask your Honor to instruct the jury that the accomplices who have testified for the prosecution here, in connection with the testimony of the accomplices here, that the jury has the right to infer that they are incriminating the defendant or defendants in the hope of reward or consideration to be extended or that has already been extended to them.

The Court: That is already covered by the charge, but I will charge it again.

11853

When you get right down to the fine point, the question is whether or not, notwithstanding hope, promise, or payment of reward, they told the truth.

Mr. Cuff: May I respectfully except to your Honor's refusal to charge in the language requested and to the qualification of the charge as made.

The Court: Yes.

Mr. Cuff: I think that is all.

11854

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Mr. Talley: May I add just one or two requests?

The Court: Yes, Judge.

Mr. Talley: I ask your Honor to charge the jury that any denial of motions made by the Court, any rulings by the Court denying motions made by counsel for the defense, is not to be taken by the jury as carrying any inference of your Honor's belief as to the guilt or innocence of these defendants, or any of them.

11855

The Court: Gentlemen, that is so. When the Judge denies the motion to dismiss, all he passes upon is this: whether or not there is evidence to present to the jury which, if found true by the jury, will justify the jury to bring in a verdict of guilty.

Mr. Talley: I ask your Honor to charge that your reference to certain portions of the testimony is not to be regarded by them as a stressing on your part of one part as against any other part of the record.

11856

The Court: I so charge. I tried to make that clear because if there is any one thing I am sensitive about in this trial it is to have my position understood as being fair. To that extent, at times, I even leaned backwards in my treatment of the Assistant District Attorney, rather than appear to show favoritism.

Mr. Talley: I ask your Honor to charge that with respect to Rubin, Tannenbaum, and Magoon that you leave to them the determination of whether they are accomplices or not, leave to the jury the determination as a matter of fact as to whether they are accomplices or not.

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11857

The Court: I decline. There is no evidence on which to submit that.

Mr. Talley: I except to your Honor's refusal to charge in the language requested.

The Court: You cannot decide any case on guesswork, and that applies to both sides.

Mr. Talley: I except to your Honor's comment in response to my request. Reserve the exceptions until after.

The Court: Have you checked those off, Mr. Rosenthal?

11858

Mr. Rosenthal: Yes, I did, your Honor.

The Court: How about No. 1?

Mr. Rosenthal: May I first make this statement, so that we can abbreviate it as much as possible? So many requests as your Honor has denied and exception taken by other counsel, may I have an exception to them? That will avoid the necessity of repeating the particular items which I may have incorporated in the requests which I handed up to your Honor.

The Court: Yes. Just tell me the first one you wish me to charge.

11859

Mr. Rosenthal: As to No. 1, so that the jury may clearly understand the request which your Honor grants or says, "I so charge," that is merely to inform the jury that that is just as much a part of the law in this case as though your Honor had charged it in your original statement to this jury.

The Court: I so charge.

Mr. Rosenthal: No. 2 is out. It has been charged, but there was one thing that I omitted, thinking that your Honor would charge it. I know as soon as I state this to your Honor, you

11860

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will, to inform the jury that an indictment—usually your Honor does state that in your charge, but in this particular charge you have not—has no meaning or probative value and must be dismissed from the minds of the jury in considering the guilt or innocence of any of the defendants.

The Court: I charge that an indictment is merely an accusation and is not evidence. It has no probative value.

11861

Mr. Rosenthal: 3 is out, has been sufficiently charged.

4 has been sufficiently charged.

5—shall I read it, Judge?

The Court: Do you want me to charge it?

Mr. Rosenthal: Yes, your Honor.

The Court: Gentlemen, I charge that no presumption of law arises from the failure of a defendant to take the witness stand, nor can you draw any unfavorable inference because of such fact, and in determining the guilt or innocence of the defendant you are precluded from in any wise discussing or considering on the question of his innocence or guilt the failure on his part so to do.

11862

Mr. Rosenthal: And will your Honor charge 6?

The Court: I charge that at no time in a criminal case is it incumbent upon the defendant to prove his innocence, but that at all times it is incumbent upon the District Attorney, by competent proof, to prove the guilt of the defendant beyond a reasonable doubt before the jury can convict.

Mr. Rosenthal: 7 has been charged.

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11863

The Court: That is withdrawn?

Mr. Rosenthal: That is withdrawn. 8 has been requested by other counsel, and I except to your modification, unless your Honor desires to charge—

The Court: You are covered by your exception. I will just mark this "withdrawn".

Mr. Rosenthal: 9 has been covered by your Honor's charge.

Your Honor has partially covered 10, but I would like your Honor to charge in the language which I requested.

11864

The Court: Well, there are just a few words I do not agree with, the words "in such a way as may be."

Gentlemen, I charge you that the corroboration of the testimony of an accomplice becomes sufficient only if it tends to connect the defendant with the commission of the crime reasonably to satisfy the jury that the accomplices are telling the truth.

Mr. Rosenthal: May I except to the modification?

11 I think is covered by your Honor's statement, so I withdraw that.

11865

I ask your Honor to charge 12.

The Court: I will read that because I have a different ruling. It reads, "I ask your Honor to charge the jury that they may take into consideration close association of the principal witnesses at various times after their arrest and while in custody, to determine what, if any, opportunity they had to converse with one another regarding the subject-matter of this indictment, and the jury is not bound by the denials unless they believe them."

11866

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The only evidence I can recall is that they were under constant surveillance; that they were never at any time together without the police being there to see that they did not discuss the case. I decline to so charge.

Mr. Rosenthal: May I respectfully except?

The Court: I would so charge if there was any evidence that at any time they were left alone. There is no such evidence. I mean left alone in one another's company.

11867

Mr. Rosenthal: May I except and, in view of the fact of your Honor's statement, ask that the request be modified to the extent that the jury has a right to draw such reasonable inference from their testimony as is warranted by the facts as they see them.

The Court: I find that it is not. I find it is all guesswork.

Mr. Rosenthal: Then I respectfully except.

The Court: The jury is not permitted to guess.

Mr. Rosenthal: May I respectfully except.

11868

The Court: You go by evidence, not by guesswork. I think the reason, possibly, Mr. Rosenthal, is clear enough. You cannot lock criminals together when they are waiting their turn to be called to testify, and let them put their heads together and maybe plot something behind the backs of the police.

Mr. Rosenthal: I don't want to enter into any discussion with your Honor, excepting that I have a different view and it is too late and I don't want to enter into a discussion as to the fact. I merely except.

The Court: That would be sloppy police work, to permit discussion.

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11869

Mr. Rosenthal: I could answer, but I don't want to reopen the case. May I ask that 13 be charged, on the burden of proof, which your Honor has not charged in your original charge.

The Court: I charge it so many times—

Mr. Rosenthal: But not in this case.

The Court: I charge it so many times I am ashamed to look at it again, but I will charge it again, even if it is No. 13.

I charge that in all criminal cases, including the case at bar, the burden of proof always remains the same and rests upon the prosecution. A defendant may be convicted only if the evidence, in accordance with the law laid down by this Court, satisfies the jury beyond a reasonable doubt of the defendant's guilt.

11870

Mr. Rosenthal: On the question of 14, that applies to the defendant Capone. I would ask that your Honor charge it.

The Court: You read the request.

Mr. Rosenthal: All right. I ask your Honor to charge the jury that if, after considering the evidence, they find it is susceptible of two constructions, one indicating the defendant Capone's guilt and the other his innocence, they must give the defendant Capone the benefit of the construction most favorable to him and must acquit him, and if the jury find that the two constructions are evenly balanced, then The People have not met the burden imposed upon them and the jury must acquit the defendant Capone.

11871

The Court: I take it, gentlemen, this goes to the question as to whether the language which is alleged by Magoon to have been used by Capone is susceptible of interpretation on the hypothesis of innocence. I have taken great care

11872

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of Capone's end of the case because of the difference between the corroborative evidence as to him and as to the others. It is so limited in record content, I even went to the extent of quoting verbatim from the record, so there would be no mistake about it. You know the text. Of course, if you think that that is capable of interpretation on the hypothesis of innocence, why, follow that and acquit him. If you think it hooks him up and it is not capable of interpretation on the hypothesis of innocence, and you believe Magoon in that testimony, then you have a right to consider whether or not it corroborates sufficiently to tend to connect Capone with the commission of the crime, the details of which, as against Capone, were testified to by Bernstein and by Berger, which go into considerable detail. Of course, if this alleged corroborative testimony is found to be true and so tends, you are entitled to convict. Otherwise acquit.

11873

Mr. Rosenthal: May I respectfully except to the modification.

11874

The Court: It is not a question of how many pages of record; it is a question of how many ramifications it goes into. It is a question of what it is worth. You are the judges of that.

Mr. Rosenthal: In line with that, may I ask your Honor to charge No. 15 in the language I request, that reasonable doubt is that state of mind that you cannot say that you have an absolute conviction to a moral certainty of the truth of the accusation against the accused.

The Court: That reads to me like an obiter dictum. Can you quote the authority for that language?

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Mr. Rosenthal: Right now, no, but it is followed by the Court of Appeals at almost every case that you want to read, without restriction, and also by—

The Court: That is only the language of the judge; it is not the language of the judge that counts, but what the decision holds.

Mr. Rosenthal: That is true, but if you take—

The Court: Different people express things in different ways. There have been millions of sermons preached on the same Biblical text by different preachers, all in different forms. No two are exactly alike.

11876

Mr. Rosenthal: That is true.

The Court: I cannot adopt the language. I decline to charge in that particular language.

Mr. Rosenthal: I respectfully except.

The Court: I can see something there that I differ with, with due respect to whoever wrote it. If you will only refer me to the authority, I will read it and then charge it. If you have a case—

Mr. Rosenthal: That was the reason why I handed this to your Honor beforehand, because if I thought there was any doubt, I would have had the authority.

11877

The Court: I think it is up to you not to hook me that way. I think it is up to you to be frank. If the Court of Appeals, where you appear so often, says that every time, please show me a case, and I will read it right now.

Mr. Rosenthal: I will do that when the jury retires.

The Court: Do it now. I have the authorities within a minute.

11878

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Mr. Rosenthal: I am not going to attempt to quote a page or a particular case.

The Court: The judge is not required to charge in the language of opinion, so held by the Court of Appeals.

Mr. Rosenthal: May I respectfully except, so that we can get ahead, sir.

11879

No. 19: I ask your Honor to charge the jury that where a person testifies before a Grand Jury without executing a waiver of immunity, he gains immunity for all crimes and matter inquired into from him.

The Court: I think that request is incomplete in form. He gains immunity for all matters concerning which he is examined before the Grand Jury, but not matters inquired into from him in the District Attorney's office or before any other official.

Mr. Rosenthal: My request was only confined to what he testifies before the Grand Jury.

The Court: I thought that is what you meant, but it does not say so.

11880

Mr. Rosenthal: That is what I intended, but I accept your Honor's qualification of the statement.

The Court: I qualify it in accordance with your concession.

Mr. Rosenthal: That is right, so we both agree on it.

I ask your Honor to charge 19, that mere association, suspicious circumstance, or even opportunity to commit crime, are not of themselves sufficient ground upon which to base criminal responsibility.

The Court: That is true, but the crux of that request is "not of themselves". So charge.

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11881

Mr. Rosenthal: I ask your Honor to charge 20, that the jury, in weighing the credibility or probative value of the testimony of any witness, may take into consideration so much of that witness's testimony, either before the Grand Jury or on any prior trial in which they may have testified, as those witnesses were confronted with on this trial and which is deemed a part of the evidence in this case.

The Court: Only in so far as, in the other trial or at the hearing before the Grand Jury, questions were asked which called for those answers and, in that event, the answers given were contradictory of or otherwise at variance with testimony given at this trial. To that extent it is charged.

11882

Mr. Rosenthal: On 21, Judge, I ask your Honor to charge the jury that mere association or acquaintanceship of the defendant with any of the accomplices in and of itself is not proof of guilt of the defendant on this charge.

The Court: That is so charged, but the crux of that is this part: "in and of itself."

Mr. Rosenthal: I except to the modification of the request.

11883

The Court: Gentlemen, don't misunderstand this: I don't say that in every case mere association or acquaintanceship of the defendant with any of the accomplices is proof of guilt. It may or it may not be. It all depends on the common sense application; it all depends on the specific case.

Mr. Rosenthal: 22. I ask your Honor to charge the jury that corroborative evidence must be evidence from an independent source of some

11884

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material fact tending to show that the defendant was implicated in the crime. Therefore, corroborative evidence is insufficient if it tends only to establish the credibility of the accomplice.

The Court: I so charge.

11885

Mr. Rosenthal: 38. I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of Solomon Bernstein, if they disbelieve the testimony of Seymour Magoon, they must acquit.

The Court: I have already charged that and, as the jury knows, I have gone particularly into that point. It is all up to the testimony of Seymour Magoon. Do you believe it? If you do believe it, it is one thing; if you do not believe it, it is another.

Mr. Rosenthal: May I have the converse of it in the next request?

11886

I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of Seymour Magoon, if they disbelieve the testimony of Solomon Bernstein, in so far as it affects the defendant Capone, they must acquit.

The Court: I so charge. That is obvious. Wait a minute. I am a little puzzled about this language as being sufficiently definite as a confession in case Bernstein is not believed. The language is that when that witness was talking to Capone, Capone replied, "What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made." I think that is too indefinite. I will charge that unless they believe the testimony of

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11887

Bernstein connecting Capone, that Capone must be acquitted.

Mr. Rosenthal: There are just a few more. In line with that, may I ask your Honor to read 395 of the Code of Criminal Procedure in so far as it affects the weight of an admission allegedly made by a defendant?

The Court: Yes. I know it by heart, but I will read it.

Mr. Rosenthal: I know your Honor knows it by heart.

11888

The Court: I charged it a thousand times, so much so that I have forgotten the number of the section.

Mr. Rosenthal: 395.^a That is all I remember, is the number.

The Court: "A confession of a defendant, whether in the course of judicial proceeding or to a private person, can be given in evidence against him"—I will omit what directly follows because it is not in this case—

Mr. Rosenthal: That is correct, sir.

The Court: —"but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed." You note it does not say "committed by him". Committed by anybody, it means. If you get a confession that is sufficiently explicit, you do not need anything more, providing the crime is proved.

11889

Mr. Rosenthal: May I ask your Honor to charge these two last? First, before that, I will jump to 44 and leave out 43.

I ask your Honor to charge the jury that in determining what weight, if any, they will give to the witness Magoon's testimony, they have a right to take into consideration not only his pre-

11890

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vious convictions but the admissions which he made upon the witness stand of participation in or commission of other crimes, including murder, and if, after taking such convictions and admissions into consideration, they believe that such witness is incapable of or has failed to testify truthfully in this case, they have a right to disregard his entire testimony or so much thereof as they believe to be untrue.

The Court: I so charge.

11891

Mr. Rosenthal: I do not know whether your Honor wants me to read these. Those are questions of law which I contend apply to the defendant in this case.

The Court: Which are they?

Mr. Rosenthal: 40, 41, and 42. I don't want to read them in the presence of the jury. If you are going to deny them, I will merely take my exception.

The Court: 40, I had this penciled notation: There is also testimony of Magoon as to Capone being involved in preparation for intended assassination of Rubin.

11892

Mr. Rosenthal: I intend to except to that. I don't want—with your Honor's permission—

The Court: The way you frame this, if you want to read it, go ahead and read it.

Mr. Rosenthal: 40. I ask your Honor to charge the jury that the only alleged corroboration of the accomplice Solomon Bernstein's testimony in so far as the defendant Capone is concerned, is the alleged oral statement made by the defendant Capone to Seymour Magoon in the year 1939, at the home of the defendant, in which the defendant is alleged to have stated, "I worked on the Rosen thing right on Sutter Ave-

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11893

nue, and I was not made. I hung around there too. What are you worrying about being made?"

The Court: Denied.

Mr. Rosenthal: Respectfully except.

I ask your Honor to charge the jury, in so far as the alleged statement which I have just read is concerned, that the jury has no right to speculate, surmise, or add to such alleged statement, but if they believe same must determine that in their opinion it is sufficient independent evidence tending to connect the defendant Capone with the crime charged, or they must acquit.

11894

The Court: I will have to think about that one. Now you are getting into a deep question of law.

Mr. Rosenthal: That is why I said to your Honor I did not want to read it out loud.

The Court: I will so charge, that the alleged preparation, if it occurred, in which Capone is alleged to have participated, for the second attempted assassination of Rubin, is of value only in connection with and in event of the declaration previously alleged to have been made by Capone being truthfully testified to by Magoon.

11895

Mr. Rosenthal: Thank you very much.

That is all, sir.

Mr. Turkus: Judge, there are just two corrections of testimony. Your Honor said that the letter to the Union was sent by Rubin's wife. Page 1275 of the record shows the letter was sent by Rubin himself, not his wife.

The Court: I correct it in that respect. Reasonable latitude for human error goes right through the trial of every case and applies to everybody. Nobody is infallible.

Mr. Rosenthal: Judge, may I correct a couple

11896

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of statements which I think you made by oversight?

Mr. Turkus: There is another one I have.

The Court: The furthest I can go is, nothing intentional was misstated. The jury must be guided by its own recollection.

Mr. Turkus: At the foot of 544, your Honor stated that when Capone was on the other side of the railroad bridge at Junius Street with a car, that that was a stolen car. That is not the testimony.

11897

The Court: I was mistaken about that. I was confused. It was Bernstein's car but I was under the impression when I charged it that it was the stolen car. The stolen car had been abandoned. I was so fatigued when I charged it that my mind was slowing up.

Mr. Rosenthal: There was another thing, Judge. I think it was an oversight. When you were charging the jury originally you made reference to the fact that as to the defendant Capone there were statements of two non-accomplice witnesses. Of course, you correct that now by stating to the jury that it is the testimony of Magoon, but I thought it was an error at that time.

11898

The Court: It all depends on the testimony of Magoon.

Mr. Rosenthal: I thought in fairness I ought to tell your Honor so that you could correct it.

The Court: Pardon me. I charged as to what Berger had testified to. I charged what Bernstein had testified to. Then I crossed up to Magoon, looked over to Magoon's testimony for the corroboration of those two.

Mr. Rosenthal: But you made an error, and I

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wanted to correct your Honor. You said two non-accomplices. You probably meant the one, Magoon.

The Court: Yes, that was a slip of the tongue, purely. It is a wonder to me, with all the names that have been brought into this case, that the human mind is able to keep track of them separately.

Mr. Rosenthal: Your Honor also said Magoon said he saw Capone in Buchalter's company.

The Court: In Rubin's company.

11900

Mr. Rosenthal: I am only telling you.

The Court: Will you repeat that again?

Mr. Rosenthal: Your Honor, in addressing the jury, said Magoon said he saw Capone in Buchalter's company. I am only doing this to correct you. There is no such evidence.

Mr. Turkus: That was the wrong name.

The Court: That should be Rubin.

Mr. Rosenthal: I say this in order that your Honor may correct it.

The Court: That is just stenographic error in my notes.

11901

I suggest this: When it comes to the discussion of exceptions, I wish to go conscientiously into exceptions with a view to revision, where necessary. I want to be perfectly free to discuss questions of evidence without the hearing of the jury, and my mind will operate better if I do that, but in sending the jury out during the taking of exceptions, I am letting a court officer stay in the room with the jury to see that the Court's instruction not to discuss the case until they are brought back, is followed, not that I distrust the jury but that I want a record in the case that cannot be questioned or raised on this case.

11902

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Mr. Talley: If your Honor please, I object to the dismissal of the jury while exceptions to your Honor's charge are being presented by counsel.

The Court: Overruled.

Mr. Talley: I ask that the jury be allowed to remain here while we are taking our exceptions to your Honor's charge.

The Court: Overruled.

Mr. Talley: Exception.

11903

The Court (to the jury): Go out in the custody of the court officer, and I will bring you back as soon as possible.

(The jury retired from the court-room.)

Mr. Climenko: Your Honor, may I state serially my exceptions?

The Court: Yes, slowly, because I want to follow.

11904

Mr. Climenko: On behalf of the defendant Buchalter we respectfully except to so much of your Honor's charge—and I am now referring to the matter almost at the outset of the charge—in which your Honor said in substance—

The Court: Will you pardon me just a minute, if I may interrupt?

Mr. Climenko: Surely.

The Court: There is one point in the charge that there must have been something about that was wrong, because all of a sudden counsel all started to confer with one another. Can you point that out now and let us get that correct?

Mr. Climenko: I am not confident that I have that exact wording.

Mr. Turkus: We thought it was "dilemma".

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You say, "When rogues fall out, it is the wise man's delight."

Mr. Rosenthal: "When rogues fall out it becomes the wise man's delight" is what some counsel said they heard, and I thought you said "dilemma", and therefore the discussion between counsel. We did not know what your Honor said.

Mr. Climenko: There was no discussion; we just asked each other.

The Court: Suppose we pass it up and let your exception be there for what it is worth.

11906

Mr. Climenko: We except first to so much of your Honor's charge in which your Honor said, in substance, that there is another way to correct the Judge, if that is necessary. I assume, your Honor, you do not want me to assign the reasons for these exceptions?

The Court: No, I do not.

Mr. Climenko: Then I will go right ahead and state them.

The Court: Yes.

Mr. Climenko: We except to so much of your Honor's charge in which your Honor said, in substance, to the jury: "I am charging you on the degrees"—referring to the degrees of homicide—"because the law says that I must. Don't compromise."

11907

We except to so much of your Honor's charge in which your Honor said that it was in the discretion of the Court to keep the jury out in order to avoid a disagreement, even though the jury might think that it ought not be required to stay out for so long a time.

We except respectfully to so much of your Honor's charge in which your Honor, in referring to the probative value of Rubin's testimony as to

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his own flight, made some explanation on that point to the jury without explaining to the jury the need for showing the identity of one who might have induced flight or as to whether there was a connection with the flight and this case.

11909

We respectfully except to so much of your Honor's charge as is devoted to the question of reasonable doubt, and I now refer to that portion of your Honor's charge in which, as I understood it, your Honor set up an objective standard of sanity and reasonableness as being the definition for a reasonable doubt.

We respectfully except to so much of your Honor's charge as dealt with the abstract question of corroboration and that portion thereof which dealt with and gave to the jury, as I understood it, merely a series of negative definitions. I make this reference to it, your Honor, only so that it may be identified.

The Court: Yes. Go ahead.

11910

Mr. Climenko: We except respectfully to so much of your Honor's charge in which your Honor instructed the jury, without further identifying or commenting on the character of the witness Tannenbaum, that it might believe Tannenbaum without corroboration if it saw fit.

The Court: Pardon me. May I inquire something right here?

Mr. Climenko: Yes, sir.

The Court: Didn't I make a blanket charge covering all witnesses on that point? Yes, I did, distinctly.

Mr. Climenko: At some point your Honor did.

The Court: Yes, I did, and that covers a multitude of sins. Go ahead.

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11911

Mr. Climenko: We respectfully except to so much of the Court's charge on the question of spoliation in which the Court stated to the jury that spoliation was an act of destruction of evidence and was tantamount to an admission that the truth would have been unfavorable, and to so much of your Honor's charge as said, with respect to the topic of spoliation, that the jury might believe that the witness Rubin may have fled because he feared that he might be framed, and to the definition generally of spoliation as given by the Court's charge.

11912

The Court: I think you misunderstood what I was driving at.

Mr. Climenko: That may be, your Honor.

The Court: Because what I said was distinctly in your favor. I was pointing out that there may be a reason to flee which is entirely consistent with the flight, which has no relation to guilt or innocence.

Mr. Climenko: I had another construction on it, Judge, which I thought was possible, and that is the reason for the exception.

11913

The Court: I read from the highest text that we have on the subject, but, personally, I don't agree with the extent to which the text goes as to probative force. I think it is over-written and, in fairness to defendants, that the jury should be allowed more liberality or indulgence towards the defense on the question of flight and spoliation. I gave the defendants the benefit of that construction.

Mr. Climenko: I noted this exception, if I may say so respectfully, because I did not think as the

11914

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language of the charge was cast it conveyed that thought to the jury.

11915

The Court: There has been too much said in legal text that is copied from Biblical text, where Solomon said, "The wicked flee where no man pursueth." The converse is not so, that the wicked flee because they are wicked. You can flee for any number of other reasons. The real motivation of flight is fear. It is for the jury to find out what the fear is and whether or not it carries a consciousness of guilt. It all depends on the circumstances. I would hate to be convicted because I ran away from something. Boys in the old days lit bonfires and ran from the police, or played baseball and ran away from the police. They were not feeling a bit guilty. They thought they were a hundred per cent right, but they ran because they did not want to be hit with the thong of the night-stick across the calf of the legs. There are lots of reasons for flight.

11916

Mr. Climenko: We respectfully except to so much of your Honor's charge in which your Honor said, in substance, perhaps more or less in these words, that it is an unholy thing to put on a witness the burden of remembering what he testified to in a trial long ago, and in which the Court substantially, by its charge, approved the repeated answer of some witness called by The People in the words "If it is in the book, it is so," and in which the Court, in this same connection, said that it was obviously necessary for counsel to obtain the minutes of the day's proceedings in order to fortify the memory of those professional gentlemen.

The Court: It has been necessary for me, while listening to these requests, to refresh my memory

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from the text, and that has not involved the necessity of remembering the specific language of the text.

Mr. Climenko: Well, it was only the connection of those thoughts.

The Court: The careful man carries a memorandum book, does not trust to memory.

Mr. Climenko: I was excepting, not to your Honor's present comment, but to the instruction given to the jury.

The Court: Purely philosophical.

11918

Mr. Climenko: We respectfully except to that portion of the Court's charge in which the Court stated, in substance, to the jury that the failure of a witness called in this trial to say something before the Grand Jury in the past which he had testified to here, was to be disregarded by this jury because that past failure was meaningless and that therefore the jury should disregard any argument founded by counsel on that circumstance.

The Court: You understand I am not called upon to argue the accuracy of what was stated in your exceptions.

11919

Mr. Climenko: That is right, your Honor.

The Court: I concede no accuracy.

Mr. Climenko: I am merely trying to identify. And in view of your Honor's last comment, generally, we respectfully except to your Honor's statements with respect to the housing of People's witnesses and your Honor's comment on that subject.

The Court: I could not possibly tell the jury the real reason, but the danger of assassination is the reason, as is well known. There would

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be no trial here had those witnesses been kept in the jail. So far as Bronx County Jail is concerned, that is a Bronx County matter, not subject to order here, and that is a thoroughly modern jail. There is no comparison between that and the Raymond Street Jail or the old Tombs where these witnesses had to be kept had they not been housed in hotels. An experience in another case shows it would be utter folly to send any material witness to Queens County Jail because of what happened in the Maione-Abbandando case, involving the bribery of the lone jailer at night.

11921

Mr. Climenko: We except to so much of the Court's charge as said, in effect, "When rogues fall out it is a wise man's delight."

The Court: Do you want me to particularly withdraw that? Do you think it did any harm? I will be glad to withdraw it.

11922

Mr. Climenko: I certainly don't want to be put in a position to ask your Honor to recall the jury for that purpose, but I don't know. It is one of those things which was unintelligible to me.

The Court: It is just one of those things that do not amount to anything.

Mr. Climenko: I do not know what was intended by it.

The Court: No harm done.

Mr. Climenko: If that is the only matter on which your Honor is disposed to rule—

The Court: I withdraw it.

Mr. Climenko: —I do not want to be placed in the position of asking the Court—

The Court: I withdraw it because, on second

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consideration, the word "rogues" might be considered as referring to the defendants on trial. That was not the intention of the quotation. It was general in its application. It has no specific application to these defendants.

Mr. Climenko: We respectfully except to the Court's charge in so far as the Court, in the charge, read for three times the provisions of Section 2 of the Penal Law.

We respectfully except to the form and the content and the emphasis in the Court's reference to the epitomization of the facts as the Court said it was giving such epitomization to the jury in the charge.

11924

We respectfully except to so much of the Court's charge as contained a disparagement of the argument of counsel for the defense in his summation with respect to a point of discrepancy in time as between the narratives of two witnesses called by The People.

We respectfully except to so much of your Honor's charge in which your Honor said, in substance, that there was no evidence in this case as to the time when the defendant Buchalter asked to have the preparatory work done. That is the only one on which I want to make any reference, your Honor.

11925

The Court: Do you know of any part of the record that shows what the time was?

Mr. Climenko: I go beyond that, your Honor.

The Court: Can you refer to the page?

Mr. Barshay: Immediately after lunch.

The Court: Can you refer to the page of the record? I will be glad to go into that.

Mr. Climenko: I wanted to bring another mat-

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ter to your Honor's attention with respect to that same matter. There is an assumption implicit in that statement to the jury that there was an earlier communication between the defendant Buchalter and somebody else about preparatory work, and I know of none in this record.

The Court: I tried to make clear they could not speculate on that. They cannot assume there was none. That is the difference.

11927

Mr. Climenko: I take exception to that portion of the charge because under it the jury is asked to speculate that there was one

The Court: Counsellor, the whole argument of counsel—I think it was Mr. Rosenthal's argument, wasn't it?

Mr. Climenko: I think it was argument tendered by all summations.

The Court: Whoever did it, the whole argument was based upon an alleged presumption that there was no communication. There is no such presumption. Go ahead.

11928

Mr. Climenko: At page 1483 the time is fixed as one o'clock. That is in the cross-examination of the witness Rubin.

The Court: I am glad you called my attention to that.

Mr. Climenko: May I add another reference, your Honor, on the same subject?

The Court: Yes.

Mr. Climenko: We also take exception in this connection to that portion of your Honor's charge in which your Honor said, in substance, that counsel assumed that Buchalter waited until after the fingering, referring apparently to

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the so-called preparatory work, and in which your Honor said in substance that the jury may assume that he gave such orders with respect to preparatory work.

The Court: They cannot assume one way or the other. The case is blind on that point. I will straighten that out.

Mr. Climenko: And your Honor also said the jury has the right to reconcile the testimony of Berger and Rubin and Bernstein as to time. All of that about reconciling the testimony of those witnesses as to time was immediately preceded, as I recall your Honor's charge, by these suggestions, that the jury might assume, in spite of argument of counsel, that Buchalter did some preliminary act, and I represent to your Honor on my recollection of this record that there is no such thing here.

11930

The Court: Take your exception. I will straighten it out.

Mr. Climenko: Thank you. Shall I proceed, your Honor?

The Court: Yes.

Mr. Climenko: We respectfully except to so much of the Court's charge as included a reading of pages 1190 and 1192 of the testimony to the jury and in that connection we respectfully except to the Court's failure to remind the jury of the contradiction by the witness Rubin in his statements to Assistant District Attorney McCarthy on December 16, 1937, in the presence of then Assistant District Attorney Hogan, and also the failure of the Court to refer, in connection with that reading, to Rubin's apparent failure to mention Berger until June, 1941.

11931

We respectfully except to so much of the

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Court's charge as referred to the alleged meeting between Buchalter and Weiss after the murder.

We respectfully except to so much of the charge as stated, without qualification, that the proof about Rubin's flight was admissible as against Buchalter and that it was competent as an implied admission and was admissible also under the law of spoliation.

The Court: Did I say "implied admission"?

11933

Mr. Climenko: That is my note, your Honor. The words that I copied were that your Honor said it was competent as an implied admission.

The Court: Go ahead.

Mr. Climenko: We respectfully except to the form of the charge in so far as it gave an example of the binding effect of certain testimony, upon the ground that in the giving of that example there was set forth before the jury by the charge only those facts which were apparently incriminatory of the defendant Buchalter.

The Court: I do not recall what it was. That is all right. Go ahead.

11934

Mr. Climenko: We respectfully except to the Court's remarks about the cross-examination of the witness Maguire.

The Court: The cross-examination of what?

Mr. Climenko: Cross-examination of the witness Maguire.

The Court: The only reason I mentioned it was because of the twist that was sought to be given, the twist of misconstruction. I want to straighten that out. It has no probative value whatever against the defendants, but it certainly does not discredit.

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Mr. Barshay: Except that it was asked with a specific view in mind—

The Court: It was just one of those little things that lawyers do in the trial of cases, with which I am quite familiar. Suppose we go on to the next exception.

Mr. Climenko: We respectfully except to the instruction that the jury might hold against the defendant Buchalter his statement, "When witnesses disappear, investigations collapse," in connection with the testimony of flight of the witness Rubin.

11936

We respectfully except to the Court's statement as to what might constitute a motive for the defendant Buchalter; and we except also to the Court's statement that as to the defendant Buchalter motive need not be shown.

We respectfully except to the method incorporated in the charge of showing specific items of evidence as binding only on specific defendants, because the effect of the method used was to specify every incriminating item of evidence seriatim against all the defendants.

We respectfully except to that portion of the recital of testimony, to the repetition of an alleged conversation between the defendant Buchalter and the defendant Weiss.

11937

We respectfully except generally to the Court's charge in its entirety as being preponderantly devoted to a consideration of those matters and circumstances which might justify a conviction.

We respectfully except to that portion of the Court's charge which in effect reviewed matters incriminatory against the defendant by reason of the failure in that review to make any reference to matters elicited on cross-examination.

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Mr. Barshay: Is there any use in going back to that issue of the talk between Rubin and O'Dwyer?

The Court: I think you brought it on yourself. The trick was tried and it did not work out. I do not think any Appellate Court, in event of conviction, understanding that trick, will give you any advantage of it.

11939

Mr. Barshay: That is the exception. It was planned to show flight from Dewey and not from Brooklyn, and it was not a trick.

The Court: Counsel, I know the way it is done.

Mr. Barshay: May I have the exception?

The Court: It is done among the best of lawyers.

Mr. Barshay: Except the jury, from the comment of the Court, may get a wrong view.

The Court: I saw to it the jury did not get the misconstruction.

11940

Mr. Talley: On behalf of defendant Weiss, I except to so much of your Honor's charge as charged the jury as a matter of law that neither Rubin, Tannenbaum, nor Magoon was an accomplice.

I except to so much of your Honor's charge as, in substance and effect, advised the jury about the housing of witnesses in hotels and the recital of the Court as to what they can do or cannot do under those circumstances, as not being evidence in this case.

I except to so much of your Honor's charge as informed the jury that you did not dare tell the jury why witnesses of this type were put in hotels.

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The Court: Judge, I will be glad to modify that, the word "dare." That means lest it be erroneous. That is the meaning of the application of the word "dare."

Mr. Talley: I doubt very much if the jury took that interpretation of it.

The Court: If you think the jury may interpret that as meaning something terrible, that would mean a sort of a calamity to somebody, I will be glad to correct it.

Mr. Talley: I think that is what they understood. I except to that.

11942

The Court: I will try to straighten that out. I am not sure I used the word "dare." I am taking your word for it.

Mr. Talley: That is the word you used.

I except to so much of your Honor's charge as advised the jury not to take stock in the argument of defense counsel that witnesses in hotels who are kept in the manner indicated in testimony, might change or alter their testimony.

I except to so much of your Honor's charge as charged that the cross-examination is simply for the purpose of breaking down the testimony given on direct, and your failure to advise the jury that the real purpose of cross-examination is to ascertain the truth.

11943

The Court: I always understood, when I was practicing law, that the purpose of cross-examination was to try to win my case.

Mr. Talley: I am quoting, as far as possible, your Honor's language. I say it was an erroneous instruction as to the purpose of cross-examination and highly prejudicial to the defendants in this case.

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I except to your Honor's reading of the record as extensively as your Honor did on the ground that in its effect it was an argument by the Court.

The Court: You mean on Capone?

11945

Mr. Talley: No, on the three defendants, the reading of the record, portions of the record that you gave, under the statement that you were doing it merely for the purpose of advising them as to the segregation of the testimony as to one against the others.

The Court: The only place where I read from the record was an extract on page 1190

Mr. Talley: Oh, no, sir.

The Court: The rest, if I recall correctly, all had to do with Capone. You may have formed the impression I read from the record, but I did not, that I can recall.

Mr. Talley: You were quoting the record and gave the pages from which you were reading, as counsel understood it.

The Court: That was under Capone.

11946

Mr. Talley: No, sir, that was on defendant Weiss.

The Court: All right, let it go at that.

Mr. Talley: It applied to all of them. I will give you the pages your Honor said you read from.

The Court: All right. I was just a little puzzled. I do not want to get into an argument about it.

Mr. Talley: Shall I note the pages of my exception?

The Court: No, don't bother. It is too late.

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Mr. Talley: I will just begin again, so that I get my exceptions straight.

The Court: You go ahead with the exceptions. I am sorry to interrupt.

Mr. Talley: I except to your Honor's reading of the record and citing the various pages from which you read, on the ground that it was, in fact, an argument by this Court and was intended by the Court to answer certain contentions of defendants' counsel and was highly prejudicial to the defendants and highly favorable to the contention of the prosecution in this case.

11948

The Court: I recall now, in regard to Capone, in order to assure that there would be no confusion and that the paucity of evidence of corroborative nature against Capone would be correctly understood, I did read from the record at different pages a number of questions and answers with which Weiss was connected, but that was not in my charge in which the specific segregation as to Weiss was referred to.

Mr. Talley: I submit that had nothing to do with Weiss.

11949

The Court: No harm done anyway; I had a right to, but you take an exception.

Mr. Talley: That is all. I want the record to note my exception.

The Court: I was a little puzzled.

Mr. Talley: I want the record to note my exception to your Honor's reading in the manner that you did.

The Court: Yes.

Mr. Talley: I except to so much of your Honor's charge as indicated to the jury that

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certain testimony which you read specifically from pages 2341, 2342, and 2344 was followed by the comment that that testimony connected the defendant Weiss—"connects up" was the language the Court used—the defendant Weiss, no matter what Strauss said, as indicated in those pages.

I except to so much of your Honor's charge as indicated to the jury, in substance, the fact that evidence as to the attempted murder, to use your Honor's language, of Rubin is applicable to the defendant Weiss.

11951

I think that covers my exceptions and I join in the exceptions already presented by counsel for defendant Buchalter.

The Court: Yes.

Mr. Talley: I also join now in the exceptions to be noted by the counsel for the defendant Capone.

The Court: Yes.

Mr. Barshay: Will the Court allow us to join in Judge Talley's exceptions already taken and Mr. Rosenthal's, which will be taken?

11952

The Court: Yes.

Mr. Rosenthal: I won't repeat any of the exceptions that have been taken by other counsel who preceded me.

I except to your Honor's definition of the meaning of a special jury and the purpose for which it is called. I think that you should advise them that once they have been called, irrespective of their intellect, that they then become the same as any ordinary jurymen, so that they don't get a sense of exaggerated ego about their actions.

I except to your Honor's charging the law of

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conspiracy, in so far as it affects the defendant Capone, in the manner in which you did, upon the ground that there is no competent evidence to show that the defendant Capone entered into any conspiracy.

I except to your Honor's statement—and I think it may have been an error on your part, and that is why I am calling it to your attention—in referring to the question of the Rubin episode your Honor stated in effect that in respect to the Rubin shooting, and then I quote, "That would come down to Weiss or Capone." The evidence here, even though I except to that portion in which you even leave that to the jury, is in respect to an episode which is supposed to have followed the Rubin shooting and has nothing to do with the Rubin shooting.

11954

Mr. Turkus: "Attempted." Your Honor said, "shooting" and should have said "attempted."

The Court: Do you remember that?

Mr. Turkus: Yes. That was the shooting that did not—

Mr. Rosenthal: You are not summing up here.

11955

Mr. Turkus: We want to keep the record straight.

Mr. Rosenthal: I am making it straight.

Mr. Turkus: All right.

Mr. Rosenthal: I except to your Honor's charge on the law of spoliation and your Honor's statement of the construction of such law in so far as it applies to any evidence.

I except to the Court's explanation of the value of questioning in respect to evidence given

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on a former trial and its meaning, as an invasion of the jury's province.

11957

In this, I think your Honor was addressing yourself to me. I respectfully except to your Honor's characterization of the summation of counsel and your statement regarding wrangling at that particular time and then your wording, "Much has been said about a fool remark of a witness," and then regarding mockery, ridicule, childish trait, stupid answer, and so forth. That, I imagine, is an invasion of the jury's province, since it is up to them to determine whether or not a man who persists in the statement that he never told anything but a little white lie is not telling them a major lie which would warrant their disregarding his entire testimony and not a point for interpretation by the Court; so I respectfully except.

11958

Then, again, your Honor's interpretation in your charge regarding the failure or non-failure of a witness to state things before a Grand Jury which had been stated here and your explanation as to the fact of the small amount of time necessary to be consumed in the Grand Jury room as analogous to the great amount of time which is spent in the court.

I also except to your Honor's invasion of the jury's province in interpreting for the jury the question as to whether or not an arrangement had been made at the, what you call, Brooklyn end prior to the time when the conversation was allegedly had between the defendant Buchalter and Rubin.

Then a statement which your Honor made in which you said that you were leaving to the

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jury the question of this attempted murder as applicable against Weiss and possibly against Capone. By virtue of your Honor's own statement, the matter should not have been left to the jury if there was a question in your Honor's mind as to its applicability to the defendant Capone.

Mr. Turkus: I think that was a bad choice of a word.

The Court: I would have to instruct the jury on that. I will withdraw the word "possibly," although I don't know why you object to it. It was simply a poor choice of diction.

11960

Mr. Turkus: That is all.

Mr. Rosenthal: I have honestly stated to your Honor these things. It is not a question of objection. It is a question of apprising your Honor of any error in the choice of words, so that I may—

The Court: Go ahead. It is late. It is ten o'clock.

Mr. Rosenthal: I am going to finish right now, sir. In line with my objection throughout the trial, I except to your Honor's reference, in quoting the alleged conversation between Magoon and the defendant Capone, to the so-called Friedman matter. I have objected to that throughout the trial. We had that long dispute about its admissibility into the evidence, and to preserve that same objection, I except to your Honor's reference to the Friedman matter.

11961

Mr. Turkus: I don't think your Honor referred to the Friedman matter in the charge.

Mr. Rosenthal: You did, and I am excepting to that portion.

11962

Requests to Charge and Exceptions

I except to the charge in which your Honor states that all defendants must be found guilty of the same degree. That question is before the Court of Appeals, and I am now excepting to it for what it is worth.

That is all

The Court: Bring back the jury.

11963

May I ask this: Supposing the jury should, before the Court will accept an announcement of disagreement as to one defendant, be ready with a verdict as to one or two of the others, what shall I do?

Mr. Talley: I think the proper procedure, if I might suggest, would be to have whatever verdict is rendered, rendered together.

The Court: Do you know of any law on the subject?

Mr. Talley: I don't know; it is simply my practice, that is all. That is the custom, to have the jury render the verdict together and not render it in part. I am just instinctively against rendering verdicts in part.

11964

The Court: It may be a moot question if not decided heretofore, and I am trying to get what another person's reaction would be.

Mr. Talley: My reaction would be it would be highly improper.

The Court: That is only a conclusion. Suppose a jury comes in here to render a verdict and the foreman stands up and says, "We agree on so and so," mentioning the first, then gives a verdict; "We find as to so and so," mentioning him by name, and then gives the verdict; "As to so and so we don't agree"; hasn't the Court a right to say that the verdict is accepted

Requests to Charge and Exceptions

11965

as rendered as to the two but sends back for reconsideration as to the third?

Mr. Talley: I would not think it would be the best practice.

The Court: That is as far as you will go, it would not be the best practice. Logically, it seems proper to me, but never mind, bring the jury back; they want to get to work.

(The jury returned to the court-room.)

The Court: Gentlemen, I will give you these few corrections, and then you may go to work.

At one place during the charge I quoted an old saw, "When rogues fall out, wise men delight." That was intended to have general application. It was not intended as calling the defendants names, but, lest it be misunderstood as having specific application to the defendants as rogues, the Court withdraws and apologizes for it. It was not so meant. Just disregard it.

I charged, in reference to the time table on Friday before the Rosen alleged murder, that I did not recall any specific hour mentioned in the record unless it was in the cross-examination somewhere, as to Rubin testifying just when he called and found Buchalter in such a state in making these declarations that he alleges Buchalter made. My attention has been called to page 1483 of the cross-examination, in which the time is fixed as follows: "Sometime about one o'clock, I imagine, in the afternoon."

My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brook-

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11968

Requests to Charge and Exceptions

lyn to go ahead with the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—and I think this is accurate and will hold and will not be error—that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails. I am not afraid of that charge. There is an exception to all of the defendants on this modification.

11969

11970

My attention has been called to the use of the words "implied admission of guilt as inferable from Buchalter's alleged procurement of Rubin's flight." The law is so finely cut on the point of inference of guilt from flight, or evidence, I should say, of guilt from flight, that I think these two words are unsafe, and I withdraw them; I withdraw "implied admission," and leave to you the rest of the charge in connection with spoliation of evidence which I read from opinions in the United States Supreme Court

Requests to Charge and Exceptions

11971

and in the Court of Appeals of the State of New York. We will let it go at that. I do not think I have to review it. I think you remember what I read in that respect.

On Weiss, my attention is called to the fact I used the word "dare" in connection with "I would not dare to state to you the reason the Court had for housing witnesses in hotels." The word "dare" was not intended to mean that I was afraid, or that there was anything about it of such an appalling nature that you should feel it was something that would make you shudder if it was revealed. The word "dare" means that, under the rules of evidence, if I dared to tell you that, I believe it would be regarded or might be regarded by an appellate tribunal, in the contingent event of this case having to come up for review, as reversible error. To avoid that, I withdraw the word "dare."

11972

In reference to Capone, in discussing his connection with the plan or scheme apparently started for the purpose of attempting a second assassination of Rubin, I used the words or expression, "the Rubin shooting." That would appear to make my remarks refer to Capone having a connection with the shooting of Rubin through the head. Capone's connection, according to the record, if true, applies only to what happened several months later, that is, sometime after he had been shot and came out, when it is alleged that Magoon went on the job, as you recall, with a view to making another attempt that would be more successful. That is what that referred to, and I trust that this straightens the record out.

11973

Is that satisfactory, Counsel?

11974

Requests to Charge and Exceptions

Mr. Talley: I have no comment to make, sir. I stand on my exceptions.

The Court: Gentlemen, the law requires that when the case is submitted for decision and the jurors go out to deliberate, the Court shall discharge the alternate jurors, so the alternate jurors have a "Good night" from the Court with thanks for their generous service.

(The alternates withdrew from the jury box.)

11975

The Court: How about the exhibits. The exhibits cannot go to the jury room unless both sides agree.

Mr. Turkus: So stipulated.

Mr. Talley: We have no objection as far as the defendant Weiss is concerned to the exhibits being sent for by the jury as the jury require. If they want any of them or want any of the record read—

Mr. Climenko: If they want them, of course, we will be glad to have them have them.

11976

The Court: The reason for that ruling is sometimes they do not come back and sometimes they are mutilated. I have even known them to be torn up for ballot slips. Exhibits are sacred, and if they are brought to the jury room they must be accounted for with accuracy.

Mr. Talley: Is it our understanding that the clerk retains possession of them and will send them in if requested?

The Court: Is it agreeable to all counsel?

Defendants' Counsel: Yes.

The Court: (to the jury) You may retire, gentlemen.

(At 10:15 p. m. the jury retired to deliberate.)

Verdict

11977

Mr. Climenko: I would like to say for the record that we stand on our prior exceptions.

The Court: Of course you do.

Mr. Climenko: And I do want to note an exception to your Honor's additional reference to an appellate tribunal.

The Court: The defendants are remanded.

(At 2:40 a. m. the jury returned to the courtroom and, through their foreman, rendered the following verdict:)

11978

"We find the defendant Buchalter guilty, the defendant Weiss guilty, and the defendant Capone guilty."

The Court: Of what?

The Foreman: Of murder in the first-degree in each case.

Mr. Barshay: With your Honor's permission, may we poll the jury?

The Court: Yes.

11979

(The Clerk asked each juror if that was his verdict, and each juror answered affirmatively.)

Mr. Barshay: May we reserve motions, your Honor, until the day of sentence?

The Court: Yes.

Mr. Barshay: On behalf of all defendants.

The Court: I think you had better make your motions now.

Mr. Talley: This is Sunday morning.

The Court: Yes, you are right. I am glad you called my attention to it. It would not be legal.

11980

*Motion on Behalf of Defendant Buchalter
to Set Aside Verdict*

(The pedigree of each defendant was taken by the Clerk.)

Mr. Rosenthal: I do not think your Honor is permitted to take pedigrees.

The Court: Well, if not permitted, we will take them over again later on.

Sentence on Tuesday, December 2, 1941.

Defendants remanded.

11981

Brooklyn, N. Y., December 2, 1941.

(Defendants arraigned for sentence.)

(Louis Buchalter arraigned.)

Mr. Barshay: In behalf of the defendant Buchalter I move to set aside the verdict on the ground that it is contrary to law, contrary to the evidence, contrary to the weight of evidence, and on all the grounds set forth in Section 465 of the Code of Criminal Procedure. On the further ground that the Court erred in the rejection and admission of testimony during the trial. Upon the further ground that the Court erred in its charge. Upon all the exceptions taken during the trial. On the further ground that this Court did not duly acquire jurisdiction of the defendant Buchalter.

11982

The Court: Motion denied.

Mr. Barshay: Exception.

The Clerk: Louis Buchalter, have you any legal cause to show why the judgment of the Court should not be pronounced against you? If so, say it now, and address yourself to the Court.

*Motion on Behalf of Defendant Weiss
to Set Aside Verdict*

11983

Mr. Barshay: Nothing to say.

The Court: Louis Buchalter, you are hereby sentenced to the punishment of death, and that within ten days from this date, subject to any legal impediments that may be in the way, naturally, the Sheriff of the County of Kings shall deliver you, together with a warrant of this court, to the agent and warden of the Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week beginning with Sunday, January 4, 1942; that upon some day within the week so appointed, the agent and warden of the said Sing Sing State Prison as Ossining shall do execution upon you in the mode and manner prescribed by law.

11984

(Emanuel Weiss arraigned for sentence.)

Mr. Talley: With respect to the defendant Weiss, I move to set aside the verdict on the ground it is against the law, contrary to the evidence, contrary to the weight of evidence, on all the exceptions taken by counsel during the course of the trial, and on the ground that the Court erred in the admission of testimony, to which objection was duly taken, and in the rejection of other evidence which was duly objected to in the course of the trial. On the further ground that the Court erred in its charge to the jury, that it charged them erroneously in matters of law and erroneously in matters of fact. I move that the verdict be set aside.

11985

The Court: Motion denied.

Mr. Talley: Exception.

11986

*Motion on Behalf of Defendant Capone
to Set Aside Verdict*

The Clerk: Emanuel Weiss, have you any legal cause to show why the judgment of the Court should not be pronounced against you? If so, say it now, and address yourself to the Court.

Emanuel Weiss: All I can say is, I am innocent—that is all I can say.

11987

The Court: Emanuel Weiss, you are hereby sentenced to the punishment of death, and that within ten days from this date the Sheriff of the County of Kings shall deliver you, Emanuel Weiss, together with a warrant of this court, to the agent and warden of Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week beginning with Sunday, January 4, 1942, and that upon some day in the week so appointed, the agent and warden of said Sing Sing State Prison at Ossining shall do execution upon you, the said Emanuel Weiss, in the mode and manner prescribed by law.

11988

The Court: Now as to Louis Capone.

Mr. Rosenberg: As to the defendant Louis Capone, I hereby move to set aside the verdict and for a new trial on the grounds set forth in Section 465 of the Code of Criminal Procedure. More particularly on the ground that the verdict is contrary to law and clearly against all of the evidence. I further move to set aside the verdict on all the exceptions taken throughout the trial and on the refusal to grant the defendant Louis Capone a severance of trial. On the rulings made with respect to the examination and excuse of talesmen and jurors, and to the denials of mo-

*Motion on Behalf of Defendant Capone
to Set Aside Verdict*

11989

tions made at the close of The People's case and the defendants' case, on the ground that the evidence fails to warrant the submission of the case to the jury as a matter of law. On the inflammatory and prejudicial summation of the District Attorney, which was not based upon or borne out by the evidence. Upon the statements made by the Court throughout the trial and upon the exceptions taken to the charge of the Court and to the Court's refusal to charge the requests made.

11990

The Court: Motion denied.

Mr. Rosenberg: Exception.

(Louis Capone arraigned before the bar.)

The Clerk: Louis Capone, have you any legal cause to show why the judgment of the Court should not be pronounced against you? If so, say it now, and address yourself to the Court.

Mr. Rosenberg: Nothing to say.

The Court: Louis Capone, you are hereby sentenced to the punishment of death; that within ten days from this date the Sheriff of the County of Kings shall deliver you, Louis Capone, together with a warrant of this Court, to the agent and warden of Sing Sing State Prison at Ossining, New York, where you shall be kept in solitary confinement until the week beginning with Sunday, January 4, 1942, and that upon some day within the week so appointed, the agent and warden of the said Sing Sing State Prison at Ossining, New York, shall do execution upon you, Louis Capone, in the mode and manner prescribed by law.

11991

11992

People's Exhibits 1 to 55

The printing of these exhibits is omitted pursuant to stipulation on pages 4022 to 4028 of this record.

Defendants' Exhibits 1 to 3

The printing of these exhibits is omitted pursuant to stipulation on pages 4022 to 4028 of this record.

11993

Defendants' Exhibit 4

THIS AGREEMENT, made this 28th day of October, in the year of Our Lord, One Thousand Nine Hundred and thirty-one; BETWEEN MORRIS BLUESTEIN and NATHAN SOBLER, of the City of Passaic, County of Passaic and State of New Jersey, parties of the first part, AND MARTIN F. KELLY INC., a corp. of N. J. and JOSEPH ROSEN of the City of _____, County of _____ and State of _____, parties of the second part,

11994

WITNESSETH: That for and in consideration of the sum of One Dollar and other good and valuable considerations, each to the other in hand paid, receipt hereof is hereby acknowledged, the parties hereto agree as follows:

That whereas, the parties of the first part are all the holders of all the shares of stock of the New York and New Jersey Clothing Transportation Company Inc.,

Defendants' Exhibit 4

11995

That whereas, the parties of the first part are also the owners of four certain trucks which were used in the trucking business of the said New York and New Jersey Clothing Transportation Company Inc., which said trucks are known as follows;

Model #621—3 ton white truck; Model #61—2 ton white truck; Model #60—1½ ton white truck; Model #51—2½ ton white truck

11996

That whereas, there is still due on the said trucks certain notes which are payable monthly, and the said New York and New Jersey Clothing Transportation Company Inc., also have a certain amount of good will in their said trucking business.

That whereas, the parties of the first part are desirous of combining with the parties of the second part in the said trucking business under the name of NEW YORK AND NEW JERSEY CLOTHING TRANSPORTATION COMPANY INC.

11997

That whereas, the parties of the second part have heretofore and still are in the said trucking business and also have a certain amount of good will in their said business.

That whereas, the parties of the second part are also the owners of five trucks which have been used in the conduct of their trucking business, which said five trucks are as follows;

One—2 ton Brockway Truck; Two—2½ ton Garford Trucks; One—2 ton Auto Car; One—1 ton ford truck.

11998

Defendants' Exhibit 4

That whereas, there are still certain unpaid monthly notes due on some of the trucks hereinabove mentioned.

That whereas, Martin F. Kelly, Inc., has also the authority and use of a certain garage in the rear of premises known as 49 Catherine Street, Elizabeth, New Jersey, which he has used in the conduct of his said trucking business.

11999

That whereas, the parties of the second part are desirous of joining in with the parties of the first part in the operation of the business heretofore conducted by the New York and New Jersey Clothing Transportation Company Inc.

Now, THEREFORE, in consideration of the mutual promises and agreements herein contained, the parties hereto agree to the following:

12000

1. That the parties of the first part will surrender to the New York and New Jersey Clothing Transportation Company Inc., all its shares of stock and on November 2nd, 1931, reorganize the said corporation, so that new shares of stock will be issued to the following; Martin F. Kelly—50 shares; Joseph Rosen—50 shares; Nathan Sobler—50 shares; Morris Bluestein—50 shares, and these 200 shares will constitute all the outstanding shares of said corporation.

2. That the said corporation shall do business with \$20,000.00 actual paid in, being the aggregate value of the combined assets of all the parties hereto.

3. That a meeting of the parties hereto will be held at the offices of Henry H. Eisenberg,

Defendants' Exhibit 4

12001

#60 Broad Street, Elizabeth, N. J. on the 2nd day of November, 1931, at which time the by-laws governing the conducting of the said corporation business will be prepared and adopted and the election of officers will take place. It is herein mutually agreed that the officers of the corporation will be as follows:

Martin F. Kelly—President,
Joseph Rosen—Vice-President,
Nathan Sobler—Secretary,
Morris Bluestein—Treasurer.

12002

4. That the corporation will do business with the BANK OF AMERICA, at its Broadway and 3rd Street Branch, and that the President, Martin F. Kelly and Secretary Nathan Sobler, shall be the only authorized signatures on the checks or other instruments in writing to be issued by the corporation, and that at the meeting of November 2nd, proper resolutions to that effect will be prepared.

5. That the corporation will hold monthly meetings on the second Saturday of each and every month and that dividends by the said corporation will be declared quarter annually.

12003

6. The corporation shall also make contracts of hire with the parties hereto, which said contracts will be in full force and effect as long as the respective parties to said contracts shall retain control or ownership of their shares of stock in said corporation, said contracts will provide for payment of \$75.00 weekly salary to each of the parties hereto and said contracts will

12004

Defendants' Exhibit 4

contain a restrictive covenant, which will prevent the respective parties to the contract from directly or indirectly canvassing from the customers of the said New York and New Jersey Clothing Transportation Company Inc., should the parties of the respective contract quit their job or sell out their interest in the said corporation, for a period of five years, from date of quitting their job or disposing of their shares of stock.

12005

7. That the corporation shall not go into any enterprise or any undertaking whatsoever without a vote of all the shareholders as it is the intentions of the parties hereto that all the shareholders of the corporation must consent to any undertaking of the corporation involving the expenditure of any monies.

12006

8. That the constitution and by-laws will also provide that should any of the shareholders desire to dispose of their shares of stock in the said corporation, that individual shall first offer his shares of stock to the corporation, who is to pay for the same according to the book value thereof or at such price as can be mutually agreed between the seller and the corporation, and should the parties be unable to come to an agreement as to the price of those shares, the said shareholder shall have the opportunity of attempting to dispose of his shares to some third party and the price offered by the said third party shall be submitted to the corporation for a competitive bid, and the said corporation is to have the first privilege of purchasing the said shares of stock, if the corporation offer is equal to or

Defendants' Exhibit 4

12007

larger than that third parties bid, and should the corporation fail or refuse to make said purchase after the offer is made, then the shareholder shall have the privilege of selling to that third party and said third party will step into the shoes of the retired shareholder with the same rights and privileges as said retiring shareholder had in the corporation.

9. That the by-laws will also provide that should one of the parties hereto decease, then the widow of that party shall receive the salary of her husband out of which salary the widow is to pay for the services of a man who will substitute for and do the work of her husband in said corporation, providing such salary does not exceed the sum of \$40.00 per week, on condition, however, that should one of the parties hereto prepare a will and designate some other person than his wife to receive that benefit, that person so designated will receive that benefit in accordance with the wishes of the deceased shareholder.

12008

10. That the parties of the first part will lease without any expense to the corporation their four white trucks hereinabove enumerated until the 15th day of December, at which time a bill of sale will be issued by the parties of the first part direct to the corporation, for the said trucks.

12009

11. That the parties of the first part will cause all unpaid notes on the trucks up to November to be paid so that the corporation will

12010

Defendants' Exhibit 4

only assume the balance of the notes due on the trucks on or after November 2nd.

12. That the parties of the second part will lease without any expense to the corporation their five trucks hereinabove enumerated until the 15th day of December, at which time a bill of sale will be issued by the parties of the second part direct to the corporation for the said trucks.

12011

13. That Martin F. Kelly will give a lease to the corporation on his said garage for a period of one year at a rental of \$50.00 per month, which said lease will contain a privilege in favor of the corporation for the renewal of the said lease for an additional period of one year at the same rental of \$50.00 per month, said lease to commence on November 1, 1931.

12012

14. That the parties of the second part will pay or cause to be paid all notes that may be due on their trucks prior to November 2nd, 1931, and the corporation will take over the obligations of the parties of the second part on said trucks, falling due on and after November 2nd, 1931,

15. That whereas, the parties hereto agree that after an adjustment of all equity of the respective interests of the parties of the first part and the parties of the second part, there is a balance in favor of the parties of the first part in the sum of One thousand Dollars which the parties of the second part agree to pay as follows: On May 1, 1932 \$500.00 and on November 2nd, 1932, balance of \$500.00.

Defendants' Exhibit 4

12013

16. The parties of the first part represent that the balance due on the trucks which were used in the conduct of the business of the New York and New Jersey Clothing Transportation Company Inc., is not in excess of \$7000.00 and should there be an excess of that amount they as individuals agree to pay the same.

17. The respective parties to this agreement hereby agree that the obligations of this corporation that are to be assumed by the respective parties shall be only those pertaining to the unpaid balance due on trucks and for work done on the bodies of the said trucks, all other obligations, such as gas, oil, wages, garage rent, tires and etc., shall be paid by the respective parties hereto and not charged upon the corporation, and the parties of the first part represent, that the New York and New Jersey Clothing Transportation Company Inc., are not indebted in any amount whatsoever, except for balance due on the trucks and for balance that may be due for body work on the trucks.

12014

12015

IN THE PLACE OF PARAGRAPH 8 the following clause is to be substituted;

That should any of the shareholders desire to dispose of their interest or shares of stock in this corporation or quit their job, then and in that event that retiring shareholder shall sell his shares of stock to the corporation who are to pay for the same one hundred per cent of the book value of said shares at that time the seller is offering the same for sale and said one hun-

12016

Defendants' Exhibit 4

dred per cent is to be paid in cash at the time the said shares are surrendered.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

MORRIS BLUSTEN (L. S.)

NAT SOBLES (L. S.)

12017

MARTIN F. KELLY, INC.

By: MARTIN F. KELLY
President

JOSEPH ROSEN (L. S.)

Signed, sealed and delivered
in the presence of

HENRY H. EISENBERG

Attest:

12018

Secretary

12019

Defendants' Exhibit 5

THIS AGREEMENT, made this 27th day of April, in the year of Our Lord, One thousand Nine hundred and thirty-two; BETWEEN MORRIS BLUESTEIN, NATHAN SOBLER and JOSEPH ROSEN, as individuals, of the City of Passaic, County of Passaic and State of New Jersey, and NEW YORK AND NEW JERSEY CLOTHING TRANSPORTATION COMPANY Inc., a corp. of New Jersey, parties of the first part, and MARTIN F. KELLY INC. a corp. of N. J. and MARTIN F. KELLY, as an individual, of the City of Elizabeth, County of Union and State of New Jersey, parties of the second part

12020

WITNESSETH: That for and in consideration of the sum of ONE DOLLAR and other good and valuable considerations, each to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto agree as follows:

That whereas, on the 28th day of October, 1931, Morris Bluestein and Nathan Sobler, who were all the shareholders of the New York and New Jersey Clothing Transportation Company Inc. and Martin F. Kelly Inc. and Joseph Rosen, agreed under the agreement above mentioned to consolidate and form one corporation, to be known and designated as the New York and New Jersey Clothing Transportation Company Inc. a true copy of which said agreement is attached hereto and made a part hereof and marked Agreement A.

12021

That whereas, all the parties hereto have carried out said agreement and consolidation and

12022

Defendants' Exhibit 5

each of the parties hereto have performed their share in the said formation of the newly formed organization, the New York and New Jersey Clothing Transportation Company Inc.

12023

That whereas, the parties hereto mutually agreed that it is for the best interest of all the parties hereto that the parties of the second part herein, to wit, Martin F. Kelly Inc. and Martin F. Kelly, individually, to be paid out as and for his interest in the said corporation, so that the remaining interest in the said corporation will be held by Nathan Sobler, Morris Bluestein and Joseph Rosen.

NOW, THEREFORE, in consideration of the mutual promises and agreements herein contained which the parties hereto admit is valuable consideration, the parties hereto agree as follows;

12024

That the said New York and New Jersey Clothing Transportation Company, Inc. do convey to the parties of the second part or to one whom they may designate, the four trucks which the said Martin F. Kelly Inc., heretofore conveyed to the corporation in the agreement above mentioned and marked agreement A;

One—2 ton Brockway Truck; One—2½ ton Garford Truck;

One—2 ton Auto Car and One—1—ton Ford Truck.

That the parties of the first part assume all the outstanding obligations of the said New York and New Jersey Clothing Transportation Company Inc. except those which will hereinafter be

*Defendants' Exhibit 5***12025**

specifically enumerated and save the parties of the second part harmless by reason of any indebtedness of the said New York and New Jersey Clothing Transportation Company Inc. except the following:

Labor, and also protested check to Mr. P. Leib	\$ 261.52	
Due to Jannelli for 5 months repairs on trucks	310.00	
Ford notes	135.00	
Hire truck to Long Branch	6.00	
Hire truck to New York from Point Koski	9.50	
Petty cash advanced to Rosen	9.00	
Cash advanced to Bluestein	5.00	
To American Oil	23.00	
Notes on Brockway Truck	231.00	
Lost Silk	286.00	
Garage rent	200.00	
Linden Sales for truck shaft	8.00	
Straightening Chassey	10.75	
Tire Rebuilding	5.50	
John Carr, battery and ignition service	21.10	
Total	\$1521.47	

12026**12027**

12028

Defendants' Exhibit 5

12029

12030

To meet these obligations the said New York and New Jersey Clothing Transportation Company Inc. are to give to the parties of the second part in addition to the trucks above enumerated the sum of \$852.97, which said amount is to be paid in the following manner: \$448.20 collection due on the route, worked on by the parties of the second part and \$100.00 in cash this day and the balance of \$304.37 by two promissory notes, one in the sum of \$154.37 due 60 days after the date of its making and one note in the sum of \$150.00 due 90 days after the date of its making, both of said notes are to be made by the corporation and to be endorsed by the individuals herein mentioned as the parties of the first part, and as security for the repayment of said notes the parties of the first part agree and hereby do assign all their outstanding accounts, subject however, to the right the parties of the first part retain in collecting the said moneys and pay the said notes out of the first moneys collected, so that said notes will be paid prior to their due date and should the moneys be collected by the parties of the first part, the party of the second part hereby designates each and all of the parties of the first part as his or its agent for the collection of the said moneys due on said outstanding accounts, and the first moneys collected on said outstanding accounts are to be applied to the repayment of the balance of \$304.37, representing the total amount due on both notes, which the parties of the first part represent they will do and will not use the said funds until said notes are paid, for any other purpose, and the parties of the second part is not to notify or collect any

Defendants' Exhibit 5

12031

moneys on the said accounts due to the parties of the first part, unless he ascertains that a default has been made in this covenant.

The parties of the first part represent that there is no indebtedness due on the trucks to be conveyed to the parties of the second part as above mentioned, except such indebtedness as the parties of the second part has knowledge of, which is represented to be arrearages on notes to the finance company, damages to the body on a large Brockway truck and such other items as is enumerated on the list herein before enumerated, as items that are to be paid for and assumed by the parties of the second part.

12032

Morris Bluestein and Nathan Sobler, two of the parties of the first part herein are to give a release to the parties of the second part for \$1000.00 mentioned in the agreement hereto attached and marked agreement "A" which was to be paid by the parties of the second part to the said Morris Bluestein and Nathan Sobler, as an additional investment by the parties of the second part in the said New York and New Jersey Clothing Transportation Company Inc. being the amount designated and agreed upon as a difference in equity.

12033

The parties of the second part are to execute a release to the New York and New Jersey Clothing Transportation Company Inc., releasing it from any and all indebtedness due it by reason of its former association in the said corporation and Martin F. Kelly as an individual is to release the said New York and New Jersey Clothing Transportation Company Inc., from the

12034

Defendants' Exhibit 5

contract of hire formerly given by the corporation to Martin F. Kelly.

The parties of the second part are also to release one, Joseph Rosen, who was formerly associated with the parties of the second part, by reason of all indebtedness due from Joseph Rosen to the parties of the second part, which said indebtedness amounted to approximately \$4750.00.

12035

The parties of the first part hereby assign to the parties of the second part the following outstanding accounts, which are the accounts above mentioned, given as security for the repayment of the two notes represented to be the balance due to the parties of the second part and the moneys collected on the accounts are to be first paid to the parties of the second part; the following are the accounts mentioned:

12036

Standard Trouser	\$ 45.64
Red Bank Co.	27.80
Ledgin	145.18
Schwartz & Starg	205.00
Finn	256.00
Ideal Paid \$12.00	27.00
Pistéal Mfg.	42.36
Princeton	36.01
Kramer & Son	49.74
Passaic Clothing	181.31
Garfield Vest	24.92
Frouvante	19.08
Estein	4.02
Condina	62.70
Duratex Mfg.	11.60
Ferrere	340.50
Capital coats, Newark	31.45

Defendants' Exhibit 5

12037

Best Make	37.00
Carbondale Clothing	71.74
Cortland	46.46
Plainfield	373.00
Enterprise	39.21
Fashion paid 86.05	170.54
Rosenberg	17.51
Rel Clothing	80.00
Umansky	121.91
Weekes Barre	90.93
Bon Weiss	29.08
Superior Quality	44.25

12038

The parties of the second part is to assign to the three individuals mentioned as parties of the first part the 50 shares of stock held by it or him in the said New York or New Jersey Clothing Transportation Company Inc. which said stock, before the assignment becomes effective shall be held in escrow by J. Bernard Saltzman, attorney for the parties of the first part, until such time as the notes above mentioned are repaid or the parties of the first part refuse or neglect to pay, the moneys that may be collected by them or it on the accounts outstanding, or any breach of this agreement on the part of the parties of the first part, and should the parties of the first part fail to comply with these provisions or any of them in any measure whatsoever, then the said J. Bernard Saltzman, is to redeliver the said 50 shares of stock to the parties of the second part, said redelivery to be made by the said J. Bernard Saltzman, immediately upon receiving notice that the agreement or any part of it

12039

12040

Defendants' Exhibit 5

has not been properly performed by the parties of the first part or either of them.

The parties of the second part is to immediately, upon receipt of the notes in question, deliver a resignation as officer and director from the said corporation, and the parties of the second part is to sign a check which will be drawn on the First National Bank of 580 Broadway, New York City, which said check will be in an amount representing the balance in said bank and the said New York and New Jersey Clothing Transportation Clothing Company Inc. is to draw under the direction and supervision of the parties of the first part and proper representations that a check so signed represents the balance held in said bank.

12041

The 50 shares of stock above referred to as those being assigned to J. Bernard Saltzman are to be held in escrow by him and the said J. Bernard Saltzman shall have full power to vote said stock as if he were the original owner thereof, provided, however, that the said J. B. Saltzman shall not consent to the filing of a voluntary petition in bankruptcy and not consent to the appointment of an equity receiver.

12042

The parties of the first part in lieu of the sum of \$304.73, being the balance due to the parties of the second part, shall have the privilege of paying the sum of \$250.00 in cash, in lieu of said sum of \$304.73, provided, however, said \$250.00 is paid on or before, Tuesday, May 2nd, 1932.

*Defendants' Exhibit 5***12043**

IN WITNESS WHEREOF, the parties have hereto interchangeably set their hands and seal the day and year first above written.

NEW YORK AND NEW JERSEY CLOTHING
TRANSPORTATION COMPANY INC.

By: JOSEPH PRICE

President

NAT SOBLER

JOSEPH ROSEN

MARTIN F. KELLY INC.

By: MARTIN F. KELLY

President

MARTIN F. KELLY

12044

Signed, sealed and delivered
in the presence of

Attested:

NAT SOBLER

Secretary


12045

Attested:

.....
Secretary

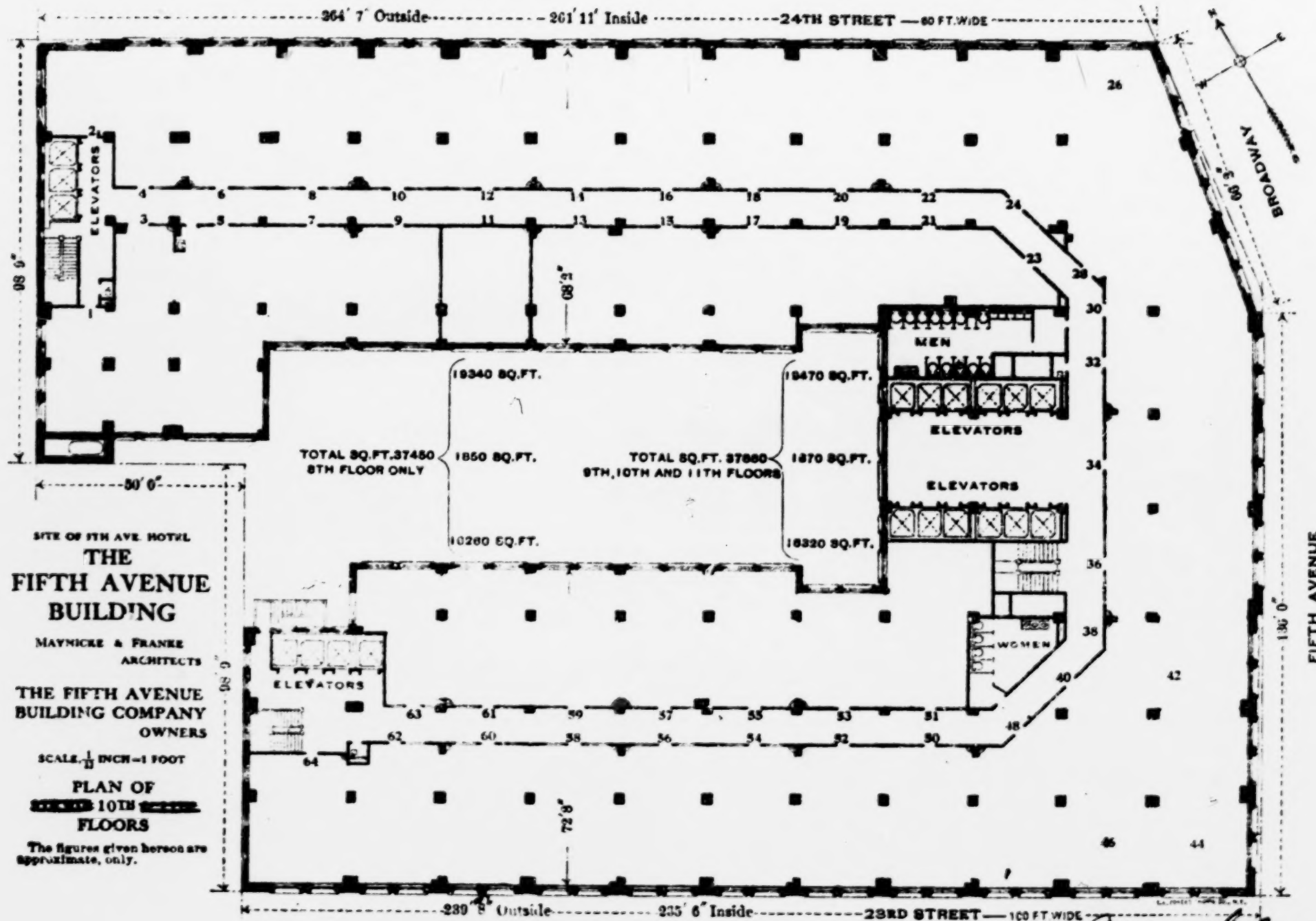
Defendants' Exhibit 6


Original Lease between The Fifth Avenue Building Company and Raleigh Manufacturing Inc., dated Jan. 29, 1936, together with diagram.

(See Opposite) 

Defendants' Exhibit 7

The printing of this exhibit is omitted pursuant to stipulation on pages 4022 to 4028 of this record.



Tenant Sign Here 

Jul 22 1900
Cal Shapiro Inc

THE FIFTH AVENUE BUILDING COMPANY

GENERAL MANAGER

4016

2

Landlord
and
Tenant

This Agreement, made this twenty-ninth - day of January - - - - - One
thousand nine hundred and thirty-six - - - between THE FIFTH AVENUE BUILDING COMPANY, a cor-
poration organized and existing under the laws of the State of New York, hereinafter referred to as the Land-
lord, and RALEIGH MANUFACTURERS INC. - - - - -

- - - - - a New York - - - - - corporation hereinafter referred to as the Tenant.

Witnesseth, that the Landlord hereby lets and rents unto the Tenant, and the Tenant hereby hires and
takes from the Landlord the room numbered 1011 - - - - -

- - - - - as shown by red ink lines on plan attached hereto, and signed
by both Landlord and Tenant, which is hereby made a part of this lease, in the tenth story of the building
known as The Fifth Avenue Building, situate in the Borough of Manhattan, City of New York, on the west
side of Fifth Avenue and Broadway, between West Twenty-third and West Twenty-fourth Streets, to be used
solely as wholesale showroom for men's clothing - and for no other purpose whatsoever, for

Occupa-
tion

Term the term of one - - - - - year 3 months - to commence on the first - - - -
day of February - One thousand nine hundred and thirty-six - - - at noon, and to end on the

Rent first day of May, One thousand nine hundred and thirty-seven -- at noon, at the yearly rent of

FIFTEEN HUNDRED SIXTY DOLLARS (\$1560) - - - - -

in lawful money of the United States, payable in equal monthly payments in advance, on the first day of
each and every month in each and every year, until the expiration of said term, at the office of the Landlord in
the Borough of Manhattan, City of New York.

PROVIDED always that this lease is made and exchanged upon the foregoing and following covenants and
conditions, all of which the Tenant covenants with the Landlord, its successors and assigns, to keep and
perform:

Default

1. The Tenant shall pay to the Landlord, or to its agents, the said specified rent, at the times and in the manner above provided, and in case of the non-payment of the said rent at the times and place above stated, or in case the said leased premises shall be deserted or vacated, this lease, at the option of the Landlord, shall become void, or, if the Landlord so elect, the Landlord shall have the right to enter the premises as the agent of the Tenant, either by force or otherwise, without being liable to any prosecution for entry, and to re-let the said premises as the agent of the Tenant, and to receive the rent therefor, and to apply the same to the payment of the rent due by this lease, holding the Tenant liable for any deficiency, and in case suit is brought to recover any rent due and in default, the Tenant agrees to pay, in addition to any statutory costs, an attorney's fee of ten per cent on the amount of rent in arrear.

Assignment or Sub-Letting

2. The Tenant shall not assign this lease nor let nor underlet the said premises, or any portion thereof, nor use nor occupy the same, nor permit the same to be used or occupied, for any other purpose than as above mentioned, without the written consent of the Landlord or its legal representatives first endorsed hereon. for each and every assignment, letting, underletting, or use; and if so assigned, let or underlet, used, or permitted to be used, without such written consent, the Landlord may re-enter said premises either by force or otherwise, without being liable to prosecution or any claim for entry, and re-let the said premises, this lease by such unauthorized act becoming void if the Landlord shall so elect and determine.

Fixtures

3. The Tenant shall take good care of the demised premises and fixtures, and make good any injury or breakage done by the Tenant, or any agent, clerk, servant or visitor of the Tenant, and all damages caused by the overflow or escape of water, steam or gas resulting from the negligence of the Tenant or any agent, clerk, servant or visitor of the Tenant, and at the expiration or other termination of the term, shall surrender the said premises and fixtures in as good condition as reasonable use thereof will permit; and the Tenant shall remove all its property from the premises, and leave them clean and free from rubbish and waste material. And the Tenant shall not make any alterations, additions or improvements to said premises without the written consent of the Landlord. All alterations, additions or improvements which may be made upon the demised premises, except movable office furniture and trade fixtures, put in at the expense of the Tenant, shall be the property of the Landlord and shall remain upon and be surrendered with the premises, as part thereof, at the termination of this lease, without disturbance, molestation, or injury.

Fire

4. The Tenant shall, in case of fire, give immediate notice thereof to the Landlord, and in case said premises hereby leased, or the building of which the same are a part, shall be partly damaged by fire or other element, without the fault or neglect of the Tenant or any agent, clerk, servant or visitor of the Tenant, the injury shall be repaired as speedily as possible at the expense of the Landlord. In case the damage shall be so extensive as to render the said premises wholly unfit for occupancy, the rent shall cease until such time as the premises hereby leased and the means of access to them shall be put in repair. In case of the total destruction, by fire or otherwise, of the said building containing said premises hereby leased, the rent shall be paid to the time of such

destruction, and at that time this lease shall cease, provided, however, that such damage or destruction be not caused by the carelessness, negligence or improper conduct of said Tenant, or any agent, clerk, servant or visitor of the Tenant. The Landlord shall not be liable for any damage by reason of inconvenience, annoyance or injury to business of the Tenant arising from the necessity of making any alteration, reconstruction or repairs of any portion of the building, however the necessity may arise.

Damage

5. The Landlord shall not be liable for any damage to any property or person at any time in said premises or building from steam, gas or electricity, or from Croton or other water, rain or snow, which may leak into, issue or flow from any part of said building, of which the premises hereby leased are a part, or from the pipes, or plumbing works of the same, or from any other place or quarter. The Tenant shall give to the Landlord, or to its agent, prompt written notice of any accident to or defects in the water pipes, gas pipes, steam pipes, electric light or other fixtures or heating apparatus, and repairs thereto shall be made by the Landlord with due diligence, provided the necessity for such repairs shall not have been occasioned by the negligence of the Tenant, or any agent, clerk, servant or visitor of the Tenant.

Inspection of Premises

6. The Landlord and its agents and servants shall have the right to enter the leased premises at reasonable hours of the day to examine the same, or to make such alterations, repairs or redecoration as it may deem necessary without any liability to the Tenant by reason of the entry; and, during the three months next preceding the time of the expiration of this lease, shall have the right to exhibit said premises to applicants to hire, and to put on said premises the usual notice "To let" which notice shall not be removed by the Tenant, or by any officer, agent, clerk or servant of the Tenant, during said period; and in the event that the Tenant shall vacate the premises before the expiration of the term, the Landlord may, without constituting an eviction or releasing the Tenant from liability for rent, make such alterations in the premises as shall be required to prepare the same for a new tenant, or such as shall in the judgment of the Landlord render the premises more readily rentable.

Repairs

7. The Landlord covenants to keep such portions of said building as it may be necessary for the Tenant to use in the enjoyment of the demised premises, in good order and substantial repair, so far as the use of said building by the Tenant is concerned, but no liability of the Landlord to the Tenant shall accrue under this covenant unless or until the Tenant has given notice in writing to the Landlord, or its agent, of the specific repairs required to be made.

Rules and Regulations

8. The rules and regulations in regard to the said building, printed at the end of this lease, shall be taken and considered as a part of this instrument, and as such shall, during the said term, be in all respects observed and performed by the Tenant, and by the clerks, servants, agents and visitors of the Tenant. If for any reason the Tenant, by consent of the Landlord, shall temporarily occupy premises in said building other than the premises described in this lease, all the terms and conditions of said lease, including the rules and regulations forming part of same, shall be applicable to the Tenant's occupation of such temporary premises.

Additions

9. The Landlord shall have the right to build any additions to the Fifth Avenue Building and to erect any additional building or buildings upon any neighboring premises, and to erect and maintain such scaffolding or other temporary structures as may be necessary or convenient in connection with such building operations, without any liability to the Tenant therefor.

10. The Tenant further agrees that all the covenants herein contained to be kept on the part of the Tenant shall be deemed conditions as well as covenants, and that, if default be made in the performance or observance of any of such covenants and conditions, this lease shall thereupon become null and void, if the Landlord so elect, and the Landlord shall have the right to re-enter the demised premises, either by force or otherwise, and dispossess and remove therefrom the Tenant and other occupants thereof and their property and effects, and to hold said premises as if this lease had not been made, without any liability either at law or in equity for any consequent damages; and the Tenant hereby expressly waives the service of notice of intention to re-enter or to institute any legal proceedings to that end. No right of redemption shall be exercised under any present or future law in case the Tenant shall be dispossessed for any cause, or if the Landlord shall in any other manner obtain possession of the premises in consequence of the violation of any covenant of the Tenant herein contained. The Landlord may restrain any threatened breach of the covenant to observe the conditions of this lease or of any other covenant herein contained, but the mention herein of any particular remedy shall not preclude the Landlord from any other remedy it might have either in law or equity; nor shall any consent or acquiescence, which may be equivalent to a waiver of redress for one violation of any covenant or condition, prevent a similar subsequent act from having all the force and effect of an original violation.

11. Whenever the right to re-enter is mentioned in this lease, it shall be deemed to include the right to enter and remove the Tenant, and those claiming under the Tenant, by means of summary proceedings, as prescribed in the Civil Practice Act, and the Landlord shall have the right to invoke any other remedy provided by law, in case of breach of any of the covenants of this lease by the Tenant, as if express consent to re-enter and to take summary proceedings were not given.

12. No shelving shall be erected in such a fashion as to obstruct the corridor lights. No mark, sign or device of any kind shall be placed on the window shades, nor shall any sign or advertisement be placed or exhibited so as to be visible through the windows. The door into the corridor shall not be left standing open. The Tenant agrees that at the request of the Landlord it will desist or refrain from any use of the name of the Fifth Avenue Building in advertising or otherwise which the Landlord may deem objectionable.

13. No stock of goods on sale shall be carried, and shipping shall be limited to samples in and out.

14. No reduction in rent shall be allowed on account of delay in completion of alterations or other construction work requested by the Tenant.

15. Interest at the rate of six (6) per cent per annum shall be charged against the Tenant on all sums of rent remaining unpaid for more than five (5) days, such interest to commence on the day such rent is due and payable, and the Tenant hereby agrees to pay said interest as additional rent for said premises.

16. In the event that the leasehold interest of the Tenant herein be levied on under execution, or if proceedings be begun in any court of competent jurisdiction to declare the Tenant bankrupt, or if an assignment for the benefit of creditors be made by the Tenant, or if a Receiver be appointed for the Tenant, then and in that case the Landlord may, at its option at any time thereafter, upon notice in writing addressed to the Tenant at said premises, terminate this lease.

17. Charges for electric current, and other service charges that may be called for by this lease, shall be deemed in addition to and collectible in like manner as rent for said premises.

18. The provisions hereof shall bind and benefit respectively the parties hereto, their executors, administrators, successors and assigns.

19. If proceedings be begun in any court of competent jurisdiction for the reorganization of the Tenant under any law, the Landlord may at its option at any time thereafter, upon notice in writing addressed to the Tenant at said premises, terminate this lease.

20. It is understood and agreed that upon the execution and delivery of this lease, the lease heretofore made to the tenant of room No. 911 in the Fifth Avenue Building, dated December 10th, 1935 is hereby terminated, and the sublease made by the tenant of said room No. 911 from Murray Knitwear Company, Inc., is terminated as of February 1st, 1936.

In Witness Whereof, The Fifth Avenue Building Company has caused its corporate seal to be hereunto affixed and this instrument to be signed by its proper officer, and the said Tenant has executed this instrument, the day and year first above written.

THE FIFTH AVENUE BUILDING COMPANY,

By.....

General Manager.

Attest:

Secretary.

Attest:

Secretary.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On the 5 day of Feb, in the year 1936, before me personally came George Chappan, to me personally known, who, being by me duly sworn, did depose and say that he resided in Mt. Kisco, N.Y. that he was then the General Manager of THE FIFTH AVENUE BUILDING COMPANY, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name to said instrument by the like authority.

Celia Dallas
NOTARY PUBLIC, Queens County
Queens County Clerk's No. 1632
Queens Register's No. 4975
New York County Clerk's No. 33
New York Register's No. T T 25
Commission Expires March 30, 1937

Notary Public.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On the 14th day of Feb, in the year 1936, before me personally came Carl Shapiro, to me personally known, who, being by me duly sworn, did depose and say that he resided in Brooklyn, N.Y. that he was then the Treasurer of RALEIGH MANUFACTURERS INC., a corporation described in and which executed the foregoing instrument as the Tenant; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name to said instrument by the like authority.

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.:

On the 14th day of Feb., in the year 1936, before me personally came Carl Shapiro to me personally known, who, being by me duly sworn, did depose and say that he resided in Brooklyn, N.Y.; that he was then the Gen. Mgr. of RALEIGH MANUFACTURERS INC. a corporation described in and which executed the foregoing instrument as the Tenant; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the board of directors of said corporation, and that he signed his name to said instrument by the like authority.

Celia Tallas
NOTARY PUBLIC, Queens County
Queens County Clerk's No. 1632
Queens Register's No. 4975
New York County Clerk's No. 33
New York Register's No. 7725
Commission Expires March 30, 1937
Notary Public.

Celia Tallas
NOTARY PUBLIC, Queens County
Queens County Clerk's No. 1632
Queens Register's No. 4975
New York County Clerk's No. 33
New York Register's No. 7725
Commission Expires March 30, 1937
Notary Public.

In Consideration of the letting of the premises mentioned in the foregoing lease to the Tenant named therein, and the sum of One Dollar paid to the undersigned by The Fifth Avenue Building Company,

, guarantor,
does hereby covenant and agree to and with said The Fifth Avenue Building Company, and its legal representatives, that if default shall at any time be made by the said Tenant or the assigns of said Tenant in payment of the rent and the performance of the covenants contained in the within lease on the part of said Tenant, to be paid and performed, the said guarantor

will well and truly pay the said rent or any arrears thereof that may remain due unto the said The Fifth Avenue Building Company, and also all damages that may arise in consequence of the non-performance of said covenants, or any of them, without requiring notice of any such default from The Fifth Avenue Building Company.

Witness hand and seal this day of in the year one thousand nine hundred and

Witness

RULES AND REGULATIONS FORMING PART OF LEASE.

1. Except as specifically permitted, tenants are not allowed to occupy, or permit to be occupied, any portion of their premises as an office for a public stenographer or typewriter, or for the sale of liquors, tobacco or cigars, or as a barber-shop or manicure-shop or as an employment-bureau. Tenants shall not allow laborers on the demised premises, except those actually working on said premises for the tenant; nor engage nor pay help, except office help, on said premises; nor advertise for help giving an address in the building. No auction sale shall be conducted on the premises.

2. The sidewalk, stoops, areas, entry, vestibules, passages, corridors, halls, elevators and stairways shall not be encumbered nor obstructed by any of the tenants, their agents, clerks, servants or visitors, or be used by them for any other purpose than for ingress and egress to and from their respective premises.

3. All injuries to the building or fixtures caused by moving the property of the tenant in and out of the building shall be repaired by the tenant.

4. The doors, skylights, and windows that reflect or admit light into passageways or into any place in said building shall not be covered or obstructed by any tenant.

5. The water-closets, wash-closets, urinals and other water apparatus shall not be used for any purposes other than those for which they were constructed, and no sweepings, rubbish, rags, ashes, chemicals, refuse from electric batteries, or other substances shall be thrown therein. The expense of repairing any damage resulting from a violation of this rule shall be borne by the tenant by whom, or by whose agents, clerks, servants or visitors, the damage shall have been caused.

6. No tenant shall mark, paint, drill into, drive nails into, or in any way mutilate or deface, any walls, ceilings, partitions, floors, wood, stone or iron work of the building. Workmen employed or designated by the Landlord must be employed by the tenants for repairs and other similar work that may be done on any part of the building.

7. No sign, advertisement or notice shall be inscribed, painted or affixed on any of the windows or doors or on any other part of the outside or the inside of the said building, without the prior consent in writing of the Landlord or its agents. Directories will be at the expense of the Landlord. The Landlord will name painters who must be employed for all sign painting and other painting, at the expense of the tenant.

8. No tenant shall do anything or permit anything to be done, in said premises, or bring or keep anything therein, which will in any way increase the rate of fire insurance on said building, or on property kept therein, or obstruct or interfere with the rights of other tenants, or in any way injure or annoy them, or those having business with them, or conflict with the laws relating to fires, or with the regulations of the fire department, or of any fire or casualty insurance company, as regards said building or any part thereof, or in respect to any elevator or apparatus therein, or conflict with any of the rules and ordinances of the City of New York, or of the Board of Health, or of any of the departments of said city, or with any laws of the State of New York.

9. The Landlord shall in all cases have and retain the power to prescribe the weight and proper position of all safes, and they shall in all cases stand on plank strips, two inches thick, to distribute the weight; and all damages done to the building by taking in or putting out any safe, or other freight, or during the time it is in or on the premises, shall be repaired at the expense of the tenant.

The moving of safes shall occur at such times as the Landlord shall designate upon previous notice to the Chief Engineer; and the persons employed to move the safes in and out of the building must be acceptable to the Landlord. No freight, furniture, or bulky matter of any description will be received into the building, or carried up or down, except during hours designated by the Landlord.

Tenants shall not, on the first three floors of the building, place a load to exceed 150 pounds per square foot, nor, on any other floor, a load to exceed 75 pounds per square foot, evenly distributed.

10. Each tenant must, upon the termination of the tenancy, restore to the Landlord all the keys of offices, rooms and toilet-rooms which shall have been furnished the tenant or which the tenant shall have had made, and in the event of loss of any keys so furnished, shall pay the Landlord therefor. Tenants shall not obtain or use any keys for any doors in the building except the keys which are provided by the Landlord.

11. The tenant shall keep the premises occupied by him in a proper condition of cleanliness, and no tenant shall permit any person or persons other than persons employed by the janitor of the Landlord to clean or take charge of such premises; but it is understood and agreed that the Landlord shall be in no wise responsible to any tenant for any loss of property from the leased premises, however occurring, or for any damage done to the furniture or other effects of any tenant by the janitor or any of his employees or others.

12. The passenger elevators shall be run during the ordinary business hours of the day, from 8 A. M. to 6:30 P. M., except on legal holidays, Sundays and at night, when one elevator will be subject to call as the convenience of the tenants may require.

The Landlord shall use due diligence in operating the elevators and furnishing heat and light, but shall not be responsible for interrupted elevator service, or interrupted heat or light supply, nor for any accident in the operation of the elevators, or heating or lighting apparatus, from any cause whatsoever.

13. Tenants, their agents, clerks, servants or visitors, shall not make or cause any improper noises in the building, or interfere in any way with other tenants or those having business with them, and the Landlord may exclude from the building any tenant or any employee of, or visitor to a tenant, who is intoxicated or disorderly, so as to be obnoxious to other tenants.

14. Nothing shall be swept or thrown by the tenants or by their agents, clerks, servants or visitors, out of the windows or doors into the corridors, halls, stairways, elevators or light-shafts, or upon the skylights of the building, or into or upon any heating or ventilating registers, or plumbing apparatus in said building, or upon the street. Nor shall carpets, rugs or other articles be hung or shaken out of any window of said building.

15. No animals or birds shall be kept in or about the premises.

16. No candles shall be permitted to use or keep in the said building any kerosene, camphine, burning fluid, or other illuminating material, except candles. No cooking is permitted.

17. All awnings and their fixtures are to be supplied by the tenants at their own expense, but of the quality, design and color which shall first be approved by the Landlord. Such awnings and fixtures may be obtained by the tenants of the Landlord, at cost price thereof, if the tenants so desire. Tenants shall not obtain any towel supply service or ice service except from persons designated by the Landlord, nor obtain drinking water for delivery on the premises from any source not approved by the Landlord.

18. Telegraph, telephone and other wires and instruments shall not be introduced by the tenant without previous notice to the Landlord and with its approval. The electric current shall not be used for power, unless written permission for such use shall first have been obtained from the Landlord.

19. In case it shall become necessary or proper at any time, by reason of accident, or for the purpose of improving the condition or operation of any elevator, heating or lighting apparatus, boiler or machinery, or any appurtenance thereof, to suspend the operation of the same until all necessary repairs or improvements thereto shall have been made and completed, the Landlord shall be at liberty to do so without in any manner or respect affecting or modifying the obligations or covenants of the Tenant herein contained, but, in such case the Landlord shall use due expedition and diligence to make and complete the repairs, improvements or reconstructions.

20. The rent of any space above the first floor shall include janitor's services, and heat from October 10th to May 1st each year, and shall also include, unless otherwise provided in the lease, electric light not to exceed one ordinary sixteen candle power incandescent lamp or its equivalent, for each five hundred cubic feet of space occupied. The janitor's services shall include the general care and cleaning of the offices, halls and toilet rooms.

21. The rent of any space on the first floor shall include heat from October 10th to May 1st each year. The Landlord does not furnish as part of the lease, electric light for any such space, but will provide such light upon terms to be agreed upon with the tenant.

22. During Sundays and holidays, and on other days outside of ordinary business hours, the supply of heat shall only be to such extent as shall, in the judgment of the Landlord, be sufficient to prevent damage to the building. Should a supply of heat at any time outside of ordinary hours provided be required by a tenant at any time outside of ordinary business hours, or on Sundays or holidays, the Landlord will, if practicable, furnish the same, at a charge based upon the additional expense involved.

23. Tenants should see that all lights are out and all windows and transoms closed, and that all corridor doors are closed and locked, when leaving their offices each evening.

24. The Landlord shall not be responsible to any tenant for the non-observance or violation of these rules and regulations by any other tenant.

25. The Landlord reserves the right to rescind any of these rules and regulations and to make such other and further rules and regulations, as in its judgment may from time to time be needful for the safety, care and cleanliness of the premises, and for the preservation of good order therein, except that the Landlord shall at all times furnish such light, heat and elevator and janitor service as is heretofore provided for, subject to the right to make necessary repairs and improvements as herein provided.

THE FIFTH AVENUE BUILDING

Lease No. _____

Room No. 1018

Term, one year, (From Feb 1, 1936
three months Expires May 1, 1937)

Yearly Rent \$ 1.560

Monthly Rent \$ 130

Dated, January 29th 1936

COUNTY COURT, KINGS COUNTY
Fee. Ex. Def. Ex. - 6
J. A. McGowan, Steno

THE FIFTH AVENUE BUILDING
COMPANY


TO

Raleigh Manufacturing
Inc.
Lease.

W. C.
B.

Defendants' Exhibit 8

Two blank checks of Raleigh Manufacturers,
Inc., Nos. 9568 and 9569.

(See Opposite) 

Defendants' Exhibit 8.

Raleigh Clothes

149 FIFTH AVENUE

NEW YORK

No. 9568

A

19

PAY TO THE
ORDER OF

\$

DOLLARS

HALEIGH MANUFACTURERS, INC.

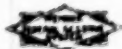
THE NATIONAL SAFETY BANK AND TRUST COMPANY
OF NEW YORK

1-774

BROADWAY AT 38TH STREET
NEW YORK

PRES

TREAS



Raleigh Clothes

149 FIFTH AVENUE

NEW YORK

No. 9569

A

19

PAY TO THE
ORDER OF

\$

DOLLARS

HALEIGH MANUFACTURERS, INC.

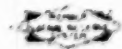
THE NATIONAL SAFETY BANK AND TRUST COMPANY
OF NEW YORK

1-774

BROADWAY AT 38TH STREET
NEW YORK

PRES


TREAS



4018

Defendants' Exhibit 9

Two blank checks of Raleigh Manufacturers,
Inc., Nos. 1121 and 1122.

(See Opposite) 

Defendants' Exhibits 10 and 11

The printing of these exhibits is omitted pursuant to stipulation on pages 4022 to 4028 of this record.

Defendants' Exhibit 9.

Raleigh  Clothes

149 FIFTH AVENUE

No. 1121

A

NEW YORK

19

PAY TO THE
ORDER OF

\$

DOLLARS

THE NATIONAL SAFETY BANK AND TRUST COMPANY

OF NEW YORK

BROADWAY AT 38TH STREET

1-774

NEW YORK

RALEIGH MANUFACTURERS, INC.

PRES

TREAS

Raleigh  Clothes

149 FIFTH AVENUE

No. 1122

A

NEW YORK

19

PAY TO THE
ORDER OF

\$

DOLLARS

THE NATIONAL SAFETY BANK AND TRUST COMPANY

OF NEW YORK

BROADWAY AT 38TH STREET

1-774

NEW YORK

RALEIGH MANUFACTURERS, INC.

PRES

TREAS

12064

Stipulation as to Exhibits

COUNTY COURT

KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,
against

12065

LOUIS BUCHALTER, EMANUEL WEISS,
 LOUIS CAPONE,
Defendants.

12066

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the originals of the following exhibits received upon the trial herein may be produced, used and referred to on the argument of the appeal herein with the same force and effect as if reproduced in the case on appeal, and it is stipulated and agreed that the reproduction of the same may be dispensed with.

PEOPLE'S EXHIBITS.

1. Photograph showing body of Joseph Rosen.
2. Photograph of Rosen Candy Store
- 2a. Small sized photograph of People's Exhibit

Stipulation as to Exhibits

12067

3. Photograph of Louis Stamler's house
4. Photograph showing Rosen Candy Store as viewed from a window of Louis Stamler's house

5. Bullet labeled "M.M."

6. Bullet labeled "M.R."

7. Bullet labeled "F.W. 2"

12068

8. Bullet labeled "F.W. 1"

9. Bullet labeled "F.W. 3"

10. Bullet labeled "F.W. 4"

11. Bullet labeled "F.W. 5"

12. Bullet labeled "F.W. 6"

13. Photograph showing plate number L-16-67, N. Y., 1936, of automobile

12069

14. Photograph of automobile

15. Photograph of candy store

16. Photograph showing walk across the railroad leading from Livonia and Van Sinderen side to Junius Street side of tracks

17. Photograph showing Junius Street side of walk over connecting up from the entrance to the stand

12070

Stipulation as to Exhibits

- 18. Photograph showing place where Samuel Pearl was walking
- 19. Gun found by Samuel Pearl in a lot and initialed "WK" in presence of the policeman
- 20. Photograph showing premises in which Max Kaufman lived, and the surrounding locale

12071

- 21. Photograph showing locale as it was in September 1936
- 22. Photograph showing garages including the one in which the Ford automobile was stored
- 23. Photograph of car of Abraham Waxman
- 24. Diagram showing the candy store as it existed in September 1936

12072

- 25. Photograph of Ardies' Soda, Candy and Luncheonette Store
- 25a. Small sized photograph of People's Exhibit 25
- 26. Photograph showing Sackman Street near where the car was parked
- 27. Photograph showing house and alley as it were when the drop was rented by Sol Bernstein

Stipulation as to Exhibits

12073

28. Photograph of garage
29. Photograph of house to which Mendy Weiss told Sol Bernstein to go
30. Photograph of an apartment house at Wyona and Belmont Streets
31. Photograph showing corner of the park at Bradford and Blake Avenues

12074

32. Photograph showing garage where the gun was hidden in the cellar
33. Order of Appointment of Extraordinary Special and Trial Term of the Supreme Court, etc.
34. Appointment and Oath of Thomas E. Dewey
35. Bank account of Max Rubin in the Bank for Savings, 4th Avenue

12075

36. Registration record of Max Rubin in the Hotel New Orleans
37. Registration record of Max Rubin in the Hotel Bossert, Brooklyn
38. Check for \$60, from Clothing Drivers & Helpers Union, etc. to Esther Rubin
39. Check for \$60, from Clothing Drivers & Helpers Union, etc. to Esther Rubin, dated Nov. 13, 1936

12076

Stipulation as to Exhibits

- 40. Thirty-two checks of \$60 each, from Clothing Drivers & Helpers Union, etc. to Esther Rubin, various dates
- 41. Eight checks of \$60 each, from Clothing Drivers & Helpers Union, etc. to Esther Rubin, various dates
- 42. Operator's License, State of Colorado, No. A 9 6138

12077

- 43. Two sheets consisting of check and stub
- 44. Bank book of Security National Bank, Kansas City, Kansas, in name of James W. Bell, deposits, Oct. 1, 1940, \$1000
- 45. Card taken from Mendy Weiss
- 46. Social Security Card No. 500-14-1906 bearing name of James William Bell

12078

- 47. Registration Certificate for Selective Service issued to James William Bell
- 48. Motor Vehicle License Receipt No. 35629
- 49. Prescription blank of Dr. Geo. Wm. Bancroft
- 50. Copy of Operator's License, State of Colorado, No. A 9 6138
- 51. Driver's License No. 1078237 bearing name of James W. Bell

Stipulation as to Exhibits

12079

52. Motor Vehicle Driver's License, Kansas City, Mo. No. 153827 bearing name of James W. Bell
53. State of Colorado, Application for a Title for a Motor Vehicle, made by Rose Bell
54. Receipt for \$40.00 from Geo. W. Bancroft, M.D. to James Bell, dated Sept. 23, 1940.
55. Receipted Bill from St. Francis Hospital and Sanatorium to James Bell, dated Aug. 29, 1940
56. Receipt for \$11. from Standard Finance Company to Rose Bell, dated July 24, 1940
57. Card of Martin' Indoor Poultry Farm

12080

DEFENDANT'S EXHIBITS.

1. Envelope in the handwriting of Sol Bernstein
2. Affidavit of Albert Tannenbaum, sworn to April 3, 1940
3. Affidavit of William J. Kennedy
7. Ten Checks
10. Copy of birth certificate of Sidney Weiss, certified June 12, 1941

12081

12082

Stipulation as to Exhibits

1. Map showing layout of streets in connection with Rosen Candy Store, Rosen Residence, Long Island Railroad, etc.

Dated, Brooklyn, N. Y., April, 1942.

WILLIAM O'DWYER,
District Attorney, Kings County,
Attorney for Plaintiffs.

12083

Refuses to sign.

.....
Attorney for Defendant, Buchalter.

Refuses to sign.

.....
Attorney for Defendant, Weiss.

Refuses to sign.

12084

.....
Attorney for Defendant, Capone.

12085

Clerk's Certificate

State of New York }
 County of Kings } ss.:

I, FRANCIS SINNOTT, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, do hereby certify that the foregoing consists of true copies of the notices of appeal and of the judgment roll in the case of The People of the State of New York against Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss" and Louis Capone, convicted of the crime of murder in the first degree, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

12086

Given under my hand and attested by the seal of the said Court this 12th day of May, in the year of our Lord one thousand nine hundred and forty-two.

FRANCIS SINNOTT,
 Clerk of Court.

12087

(Seal)

[fol. 4030] PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

LOUIS BUCHALTER, EMANUEL WEISS and LOUIS CAPONE,
Appellants

(Decided October 30, 1942)

APPEALS from judgments of the Kings County Court (HAYLOR, J.) rendered December 2, 1941, upon verdicts convicting each of the defendants of the crime of murder in the first degree.

I. Maurice Wormser and Jesse Climenko, for appellant Louis Buchalter.

Alfred J. Talley, James I. Cuff, M. M. Kreindler, Harry G. Anderson and Samuel Bader for Emanuel Weiss, appellant.

Sydney Rosenthal, Benjamin J. Jacobson, Leon Fischbein and Emanuel Rosenberg for Louis Capone, appellant.

Thomas Craddock Hughes, Acting District Attorney (Solomon A. Klein, Burton B. Turkus, Henry J. Walsh and Edward H. Levine of counsel), for respondent.

CONWAY, J.:

The defendants were indicted with three others for the crime of murder in the first degree. They were represented by able counsel during a trial which lasted about eleven weeks. The record of the trial consists of more than four thousand pages in addition to the twenty-seven hundred pages containing the examination of talesmen.

The questions of law presented by defendants' counsel may best be examined against the background of the facts as found by the jury and the facts are therefore set forth with reasonable fullness as a preface.

The deceased Joseph Rosen was present in his small candy store on Sutter avenue in Brooklyn on Sunday morning September 13, 1936. An automobile was driven up to the door of his store. The occupants riddled the body of Rosen with bullets. There were ten wounds of entrance. One Stamler, a tailor, at the sound of the shooting, looked through his window across the street, saw the automobile pull away and took the license number. A few minutes later an automobile turned the corner of Livonia and Van Sinderen avenues so quickly that the brakes or tires

screeched somewhat and attracted the attention of Merlis who had a newspaper stand there. The automobile came to a stop about forty feet from the corner and four men emerged. They walked toward the newspaper stand and up over the trestle which crossed the L. I. R. R. track at that point and which led down into Junius street. The automobile thus abandoned,—a black two-door, Chevrolet coach,—had the license number which had been taken by Stamler.

The theory of the prosecution's case was that the defendant Weiss was one of the slayers; that the defendant Capone was one of those who had arranged for the murder, who had laid out the route to be taken by the automobile used in it and that he and others were waiting with two cars at the other side of the trestle on Junius street, to assist in the escape of the slayers; that the defendant, [fol. 4031] Buchalter, referred to as Lepke by the witnesses throughout the trial, had ordered the death of Rosen through fear that he would testify against him in the so-called Dewey investigation, involving racketeering and extortion. There were three others named in the indictment: Harry Strauss, who had been executed prior to the trial (see *People v. Goldstein*, 285 N. Y. 376), James Ferraco, who had not been apprehended, and Philip (Farvel) Cohen as to whom a separate trial had been granted by consent.

All of the defendants were represented by experienced counsel. Lepke and Weiss were each represented by two attorneys, each of whom was permitted by the court to participate actively in the trial. It is important, for the purpose of discussing one of the law points affecting the charge of the court, and for no other purpose, to indicate and comment upon the defenses interposed by each of the three defendants on trial. The defendant Capone did not testify and called no witnesses. The defendant Weiss did not testify but called witnesses. He called his mother, his two brothers, his wife and a family friend to testify to an alibi covering the period prior to and at the time of the murder. He also called another witness to impeach the credibility of a prosecution witness, Bernstein. The defendant Lepke did not testify but called witnesses for the purpose generally of establishing that the deceased was a person of no importance financially or in the business world; that the testimony of the wife, daughter and son of the deceased as

to the business venture of the deceased and its financial condition was unbelievable, whereas the position of the defendant Lepke was so important that it was incredible that there was any reason for the defendant Lepke to order or direct Rosen's death. This was more clearly shown from the language of counsel for the defendant Lepke in his summation as follows: "I said I did not represent an angel, I meant just this: *I condemn the defendant Buchalter's past life with as great vehemence as I possess.* I am not in sympathy with his activities in the past—I condemn the vicious circle which contrived those people to domineer unions—the racketeers Weinstein and Katz. I condemn them with all the strength I have. It is they who prey upon innocent workmen in this city. I condemn the manufacturers and employers who did not complain to the authorities so that they could put an end to this vicious practice of preying upon labor. But they did not complain—not because they were afraid—because some of them hoped, by yielding to the racketeers of the industry, that they would gain an economic or financial advantage over their competitors. *I condemn every act of the defendant Buchalter's past life.*

.

So, gentlemen do you get my point—that Buchalter, who was being looked for by Dewey as *king of the flour racket and king of the crime racket*—he was looked for by the Government—he had so many charges hurled against him that everybody in this universe was searching for him, that he would worry about a possible misdemeanor? I say, "Possible misdemeanor" at the hands of Rosen. What [fol. 4032] proof is there in this case by anyone that Rosen was roaming the streets of Brownsville threatening to go to Dewey? What could he tell Dewey? Nothing. Because, in telling Dewey that four years ago Buchalter drove him out of business, I take it he would also have to tell Dewey the good traits of Buchalter—that he got him a job—that he tried to get him another job—that he effectuated transfers and that he got \$100 and \$125 a week. What was there that Buchalter had to fear at the hands of Rosen *with thousands of complaints running to Dewey in extortion totaling a half a million dollars?* Would he worry about Rosen, an ordinary poor truck driver?

At least one of the witnesses called by Lepke corroborated in important details the testimony of Rubin, the principal prosecution witness (see *post*).

The defendant Lepke also called witnesses for the purpose of showing that conversations testified to by some of the witnesses for the prosecution could not have been held, with the accompanying anger and excitement to which testimony was given, because the office in which they were held was small and because others were present therein or in adjoining offices at the times mentioned who would have heard the conversations if they had occurred. Such were the defenses. No time limit was placed by the court upon counsel for the defendants for their summations and the presentation of those defenses.

Facts

On ²Max Rubin became an executive board member and one of the finance committee of Local No. 4 of the Cutters Union of the Amalgamated Clothing Workers of America (hereinafter called Amalgamated). Murray Weinstein was business agent and later manager of the local and executive board member of Amalgamated. As an official of the Amalgamated, Rubin came to know the defendant and was with him almost daily. He also worked for Lepke in connection with Local 138 of the Flour Truckmen's Union and the Greater New York Tailors Expressmen's Association. Later Rubin became business agent of Local 240 of the Clothing Drivers and Helpers Union, which was also affiliated with Amalgamated. In 1931 a dispute arose between two groups in Local No. 4 of Amalgamated. Lepke supported one group, which gained control. Rubin arranged a meeting between the leader of the opposing group and Lepke, and certain officials were given a year's pay and withdrew from the union. Rubin, however, was continued by Lepke as business agent of Local 240. Rubin was present at the meeting, at which it was arranged by a general organizer for Amalgamated, that one Danny Fields and Paul Berger (the "finger man" in the Rosen murder) should be the intermediaries between the Amalgamated and Lepke.

In 1932 Lepke told Rubin that the union wished a stoppage on a specific date of all the trucks which carted clothing in and out of New York city. Rubin told Lepke that

he believed he could stop all the trucks except those of three concerns: Garfield Express Co., Branch Storage and New York and New Jersey Transportation Company (the company [fol. 4033] ~~pany of Rosen~~), (hereafter called N. Y. and N. J. Co.), which handled both union and non-union work. The Garfield Express, hereinafter called Garfield, owned by Louis Cooper, was located at Passaic, New Jersey, was non-union, and operated in competition with N. Y. and N. J. Co. in Passaic. N. Y. and N. J. Co. did business in New York, New Jersey and had a little business in Pennsylvania. Lepke said that the Pennsylvania business had to be abandoned. Rubin visited the N. Y. and N. J. Co. officers and then returned and advised Lepke that when he told Rosen that he would have to give up the Pennsylvania business Rosen said that that was the only thing he had in the business; that he had no money investments but that he had brought in the Pennsylvania business; that Rosen's two associates also objected.

Lepke told Rubin he wished to see Rosen and they met in the office of one Weiner, a former business associate of Lepke. Rubin, Dalny Fields and one Gurrah were present. Rosen told Lepke that the Pennsylvania business was the only thing he had in the N. Y. and N. J. Co., and that if that were lost that he would lose everything. Lepke then said he wished to see Rosen's books. In response to a telephone message, they were brought by Rosen's daughter, Sylvia, who was a witness upon the trial. Lepke and Gurrah then went over the books and told Rosen what business he could not take. Rosen said he would be ruined. Rubin told him "not to hit his head against a stone wall." Lepke then promised that they would do something for him and Rosen left.

As to Louis Cooper, of Garfield, Rubin testified that when Lepke ordered him to stop his trucks, Cooper refused, saying that he had been double-crossed by the Amalgamated once and did not intend to be double-crossed again. Lepke said "you have nothing to do about worrying now, I am the Amalgamated, they will not double-cross you this time;" that then Cooper agreed to stop if Lepke would become his partner in Garfield to which the latter agreed.

The stoppage occurred and Rosen was forced out of N. Y. and N. J. Co. The Garfield Express Co. profited materially as a result. Later Rubin had a talk with Rosen

in which the latter complained that everyone else had returned to work after the stoppage but that he was "on the street." When this was reported to Lepke he asked what could be done and Rubin suggested that Rosen had once worked for Louis Cooper as a foreman and they might get him back there. That Lepke arranged. About eight months to a year later Cooper discharged Rosen and refused requests both of Rubin and Lepke to take him back. Rosen was then out of work for sixteen months during which period he complained to Rubin that he was a married man with a family and that they had nothing to eat.

After the appointment of Mr. Dewey as Special Prosecutor, Rubin had a talk with Rosen. Rubin then told Lepke [fol. 4034] that they had a desperate man on their hands; that they had to get him a job; that he was doing much talking and that they were likely to get into a lot of trouble but that Rosen was willing to work for anything. Lepke then arranged to obtain another job for him.

In the spring of 1936 Rosen opened a candy store on Sutter avenue. In June of 1936 Lepke told Rubin that Rosen was going around Brownsville (in which Sutter avenue is located) "shooting off his mouth that he is going down to Dewey's office." Rubin told Lepke that he would get the members of Local 240 to patronize Rosen's candy store. Lepke said he did not care what he did so long as Rosen kept quiet. Rubin called a meeting of the executive board and arranged for the spending of money in Rosen's store.

In July of 1936 Lepke again told Rubin that Rosen was threatening, in Brownsville, that he was going to Mr. Dewey's office and was going to testify about Lepke. Rubin told Lepke that there was nothing to worry about; that Rosen must be up against it. Thereafter, Sylvia Rosen Greenspan asked Rubin to visit her father. Rubin told Lepke that he thought it was a good opportunity to straighten Rosen out; Lepke told him to take two hundred dollars to Rosen and to tell him to stay out of town until he was told to return. Rubin gave Rosen the two hundred dollars and the latter said he would go to his son's place at Reading, Pennsylvania.

The next time Lepke spoke to Rubin about Rosen was on Friday, September 11, 1936. Lepke complained that Rosen had stayed at Reading, Pennsylvania, only for a

few days and had double-crossed them. He said that Rosen was going around Brownsville threatening to go down to Mr. Dewey. Lepke said: "Well he is not going down to Dewey or any other place. He and nobody else are going down any place or do any more talking or any talking at all." Rubin begged Lepke not to be rash, to remember that he (Rubin) had visited Rosen's store in July and to permit him to handle it, saying that he would go over to see Murray Weinstein. Lepke said he did not care where Rubin went but to straighten Rosen out. Rubin rushed over to Weinstein and asked him to do something about Rosen but Weinstein said he could not do anything. Rubin returned and told that to Lepke. Lepke then directed Rubin to get Paul Berger and send him to him right away. Rubin found Berger and told him that Lepke wanted him. Rubin then left to attend a ball game of the union at Vineland, New Jersey, and stayed at Atlantic City until Sunday noon.

Within forty-eight hours after Lepke sent for Berger, Rosen was murdered.

Rubin read about the murder on the Monday morning after its commission. He talked with Lepke about it, pointing out that he had visited Rosen in July and was therefore worried. Lepke reassured him telling him that he had nothing to worry about so far as Brooklyn was concerned since Brooklyn was all right. In September, Rubin called Lepke's attention to an article in a New York news-[fol. 4035] paper, stressing the fact that it did everything but mention Rubin's name and that in effect it made him a principal in the murder. Again Lepke told him that he had nothing to worry about because the police were looking for Farvel Cohen (the defendant Philip Cohen, named in the indictment), Shimmy Salles and the defendant Weiss and that, when he was ready, he would send in the first two mentioned for identification purposes, but would not send in Weiss.

In early October, Lepke told Rubin that an Assistant District Attorney named McCarthy "was going around saying that he is going to make one of the best pinches he has ever made; he is going to collar Lepke and Gurrah for the Rosen murder." He told Rubin to leave town as things were "very hot in Brooklyn;" to go to Glens Falls and to stay with Danny Fields who was hiding there;

to take Paul Berger around and to introduce him to the business concerns from whom he was collecting. Rubin returned after a week and saw Lepke at a hotel in Manhattan. Lepke told Rubin that he would have to go away again, but in the meantime to stay out of sight of everyone in the clothing industry; that Brooklyn was not yet straightened out and that the Dewey investigation was closing in on everyone. Shortly thereafter Lepke told Rubin to go to Salt Lake city. Rubin then consulted the lawyer for Local Union 240, Mr. Edward C. Maguire, and thereafter told Lepke that Mr. Maguire wished to see him.

Rubin and Lepke visited the offices of Mr. Maguire who was the attorney for the International Brotherhood of Teamsters. Mr. Maguire told them that it was unwise for any man to become a fugitive while an investigation was pending and that it would be ridiculous for a married man with a child to go off as a fugitive indefinitely; that Rubin was a representative of a union and that no union would stand for its representative being off in some unknown place and that the membership would oust him. Mr. Maguire testified that Lepke interrupted during the early part of the talk and said "If witnesses are not available, investigations collapse." At the conclusion of the talk Lepke said "I will see about it" and he and Rubin departed.

After they left Mr. Maguire's office, Lepke told Rubin that he had not wished to say it in the office but the case in Brooklyn would be thrown out; that Assistant District Attorney McCarthy would not handle it any more and that another Assistant District Attorney would be put on it and then pushed on to something else in another building and that the case would die. Rubin then agreed to go to Salt Lake city. He left on October thirtieth and stayed there at the Carlton Hotel. During the month while he was there he received four fifty-dollar money orders through Western Union. He then returned to New York city and told Lepke that he was too lonesome to stay longer; Lepke told him he should not have returned as Brooklyn was not straightened out and investigations were getting very serious. Rubin stayed in New York until early in December when he was told by Lepke to go to New [fol. 4036] Orleans and that he would send him money there. Rubin went to New Orleans but returned in a week without telling Lepke. Then he telephoned Paul Berger and later received a visit from him. Berger told the witness

that Lepke wished to see him, waited while he dressed and then drove him to a place where Lepke was waiting under an awning. Rubin told Lepke that he could not stay in New Orleans. Lepke then asked Rubin how old he was and, being told, said, "It was a ripe age." He was then told to go to Philadelphia to meet one Zenreith, alias Bartfield. The latter and Rubin took an automobile trip which lasted seven weeks during each of which the witness received fifty dollars in cash from New York.

Rubin next saw Lepke in Washington and told him he was anxious to get back to New York. Lepke told him he could not come back. After further conversation Lepke told the witness to go to a Brooklyn hotel where Rubin registered under an assumed name. He was paid fifty dollars a week by Berger during that period. He then took an apartment in Brooklyn. He stayed in that apartment until August. He again talked with Mr. Maguire and then went down to the office of Mr. Dewey at 120 Broadway where he talked with Mr. Hogan (now District Attorney of New York county) and Mr. Ten Eyck, two of Mr. Dewey's assistants. That interview was arranged by Mr. Maguire. Following the interview he went back to work as business agent of Local 240. By that time Lepke had fled from the State.

Toward the end of September, 1937, Rubin testified before a grand jury in New York county in the Dewey investigation. On October first, four days later, as he was walking toward his home he was shot through the head.

On December 16, 1937, Rubin was examined by Assistant District Attorney McCarthy in the presence of Assistant District Attorney (now District Attorney) Hogan of New York county. He then testified that he never told Rosen to leave town, never gave him any money to go away and that he knew nothing about the Rosen murder.

In amplification and extension of the testimony of this confidant, as well as intermediary and messenger, of Lepke, of the testimony of those who heard the murder shots, who saw the car driven from the scene and who later saw it abandoned on Van Sinderen avenue by the four perpetrators of the deed and of the testimony of the lawyer for the labor group to whom Lepke revealed his method of conduct in circumventing the law—"when a witness is not around there cannot be a case"—there was the

testimony of some of those actively concerned in the murder.

I shall take first that of Paul Berger for whom Lepke sent when he finally lost patience both with Rubin and Rosen. Berger was employed by Local No. 4. He acted as a go-between for Lepke and Weinstein. On the Friday before the murder Rubin gave him Lepke's message that the latter wished to see him. Berger went to No. 200 Fifth avenue to see Lepke. Lepke said "Do you know that Joe Rosen." Upon receiving an affirmative reply he said "I [fol. 4037] want you to point him out." He and Lepke then took a cab to Suffolk and Grand streets. Lepke walked along Suffolk to Broome street and told a man he met there to tell the defendant Mendy Weiss that he wished to see him. Weiss came and Lepke talked to Weiss for five or ten minutes apart from Berger. Then Lepke brought Weiss over and told Berger to point Rosen out to Weiss. Berger took Weiss to Brownsville in Brooklyn and, after Weiss had spoken to the defendant Capone, Berger pointed out Rosen to Weiss at the candy store. The murder occurred approximately thirty-six hours later.

Berger read of the murder in the newspaper and later talked with Lepke about it. Lepke told him that it would be advisable for Rubin to leave town until things cleared up in Brooklyn. Still later, after Rubin's return from New Orleans, Rubin telephoned and Berger told Lepke that Rubin was at his home in the Bronx. That was the night that Rubin and Lepke talked under the awning near Amsterdam avenue. Later Lepke and Rubin came back to the automobile and he heard Rubin say: "Listen, Lep, I got to be around somewheres where I can be near my wife and kid." It was then arranged for Rubin to go downtown to stay at a hotel. Berger then drove Rubin home, waited until he obtained his clothes and then drove him downtown where Rubin checked in at a mid-town hotel. Subsequently Berger saw Rubin while the latter was living in Brooklyn disguised by a moustache and glasses. He told Lepke how funny Rubin looked and was directed to keep "pepping him up." In June, 1937, Lepke told the witness that "things were getting too hot, he will have to lamm," and then fled.

In the fall of 1937 the defendant Weiss talked with Berger about the fact that Rubin was "squealing" and asked

Berger to point him out to one Schlermer and to work with the latter. Berger then took Rubin to lunch in order that Schlermer might see him. Schlermer reported that he had trailed Rubin to a down-town building. Schlermer also said "that he has got to pick him up again tomorrow around the clothing market and when he goes in to the subway to go home he has got to get in touch with somebody in the Bronx." Then Rubin was shot as he walked toward his home in the Bronx.

Six or seven months later Berger drove with defendant Weiss to Livonia avenue, Brooklyn. Weiss said that he wished Berger to point out Rubin to Magoon. "This time the s of a b ain't going to be so lucky." The following morning Berger met Magoon and pointed out Rubin. There was delay in shooting Rubin a second time because he was under police protection and it was desired to shoot him without shooting the policeman. Magoon watched in the vicinity of Rubin's house, dressed as a laborer. A policeman questioned him and no further attack on Rubin was made.

In May, 1940, the defendant Weiss fled from the State because of his belief that one of Lepke's men named Tannenbaum (a witness at the trial) was talking. Weiss was arrested by federal narcotic agents in Kansas City, Mo., on April 6, 1941. He was living under the name of James W. Bell and had cards printed under that name purporting to indicate that he was vice-president of a mining company. He told the agents that he did not mind going back to New York except that he hated "to sit between O'Dwyer and Dewey." He also said he: "had intended to surrender himself at a later date when O'Dwyer would be out of office." He had with him some diamonds and twenty-seven hundred odd dollars in cash. Berger was arrested in June of 1941 and charged with the murder of Rosen.

The witness Tannenbaum went to work for Lepke in 1931 at thirty-five dollars a week. He took orders from Lepke and was told by the latter to obey the directions of Gurrah and the defendant Weiss. Tannenbaum's salary was increased from thirty-five dollars to one hundred and twenty-five dollars a week between 1931 and 1936. Two days before Rosen's death Lepke told Rubin in Tannenbaum's presence that Rosen was one "who will never go down to talk to

Dewey about me." He heard Rubin tell Lepke that he would see Murray Weinstein to see if the matter could not be straightened out. Three or four days later Tannenbaum was in Lepke's office when the defendant Weiss reported on the Rosen murder. Weiss related that everything had proceeded properly except for the fact that the defendant Harry Strauss to whom Weiss had given strict orders not to do any shooting, began shooting at Rosen as he lay on the floor after having been shot by Weiss. Lepke said: "All right, what's the difference as long as everyone is clean and you got away all right?" and patted Weiss on the back. Over coffee, shortly afterward, in response to a question Weiss explained that Rosen was "some fellow used to be in the trucking business and that he was threatening to go to Dewey and talk about Lep."

While Tannenbaum had never been convicted of a crime he admitted he had engaged in crimes such as robbery with a gun, sluggings, strike-breaking, throwing stink bombs and in six murders.

Seymour Magoon was a witness who testified that he was employed by Harry Strauss, Bugsy Goldstein (both executed, see *People v. Goldstein*, 285 N. Y. 376), the defendant Louis Capone and one Abe Reles (now dead). While he had received his first conviction in 1940, and that for vagrancy, he had stolen fifty or more automobiles and participated as the "wheel-man" in two murders, had shot several persons and committed several assaults. In the fall of 1938 the defendant Weiss in the presence of the defendant Capone, Strauss and Reles asked him to go to meet Paul Berger and another man on the following morning. Weiss said that Berger would point out Rubin and for him to follow Rubin, to find out his habits and to see if he had a police bodyguard with him. On the following day Berger pointed out Rubin and after following him and his bodyguard during that day Magoon talked that evening to the defendants Strauss, Weiss, Capone and Reles. The defendant [fol. 4039] and Weiss told him to put on old clothes and to watch Rubin's house in the Bronx. On the following night the defendant Capone, said "that Rubin is hurting Lep and we got to hit him in the head and get rid of him." Magoon followed Rubin for the next three days during which on one occasion he was questioned by a police officer while watching Rubin's house. Magoon reported that incident and the

continued presence of Rubin's body-guard. Weiss said "then we will have to track back him and the cop." That was in connection with the preparation for the second projected assassination of Rubin.

One Sholem Bernstein worked for the defendant Capone. On the Friday before the Rosen murder the witness was in his automobile talking with defendant Harry Strauss. The defendants Capone and Weiss and one Philip (Farvel) Cohen (a defendant also named in the indictment but as to whom there has been a severance, *talking with defendant Harry Strauss. The defendants Capone and Weiss and one Philip (Farvel) Cohen (a defendant also named in the indictment but as to whom there has been a severance, (supra),* approached. They called Strauss from the car. About three-quarters of an hour later they returned and Strauss said "steal a car and get a drop"—a "drop" is a garage in which to place a stolen car. Strauss also told Bernstein, after he had stolen the car and had arranged for the "drop" to meet him at four o'clock on the following afternoon. Without going into details, Bernstein rented a "drop" and with the aid of one Muggsy Cohen, stole a black two-door Chevrolet. On the following day at four o'clock he kept his appointment. The defendant, Capone, complained of the fact that a two-door instead of a four-door car had been stolen but nevertheless showed the witness the route to be followed from Rosen's candy store, where, as Capone said, "here is where somebody is going to be killed." He showed the route through the various streets to Van Sinderen and Livonia avenues where the car was to be abandoned. Capone went over it seven or eight cars. Then the defendant Capone told the witness to steal plates from a car that would not be missed and after the plates had been put on, to return with the car at ten-thirty o'clock that night. When he returned that night Strauss brought a package with pistols in it and that was put in the compartment of the car. After watching Rosen's store for a period of time it was decided that it would be safer to murder him in the morning when he opened his store. The witness, after putting the car away, went to the home of Farvel Cohen on Eastern parkway. He was told to get some sleep because he would have to be up at five in the morning. The defendant Weiss awakened him and told him to get the automobile and the guns. All then went to the

hallway of an apartment house about a block from Sutter avenue. The witness, curiously enough, did not know that it was Rosen to be killed. He had never heard his name. After an hour's wait the witness was instructed by the defendant Weiss to get the car and to stop it in front of [fol. 4040] Rosen's store and to make certain that the motor was running. Before he drove over he saw the defendants Weiss, Strauss and Ferraco (not apprehended) walk toward the store. Then Weiss and Strauss walked in. Ferraco stayed outside. He heard a number of shots and Weiss and Strauss came running out and with Ferraco entered the car. He followed the route as outlined to Van Sinderen avenue and Livonia avenue. He took the key out of the car and all four got out and walked over the bridge down into Junius street. There Capone had the witness Bernstein's car and Philip (Farvel) Cohen had his own car. Weiss gave the witness his gun and told him to break it and throw it away. Capone told him to take Ferraco and drop him off. Then the defendants Capone, Weiss and Strauss drove away in Cohen's car.

After District Attorney O'Dwyer took office and in February, 1940, this witness fled the State. He stayed for a few weeks at Miami Beach, came back to Brooklyn and then left for Los Angeles. Curiously, Bernstein came to Brooklyn from Miami in March, 1940, in order to see a lawyer. He went to the lawyer's home. There he saw also another lawyer who had been the witness' "regular" lawyer for many years. Those two lawyers are two of the three who represented the defendant Capone upon this trial. Then in turn he went to San Francisco, Dallas, St. Louis and Chicago. He then returned to Brooklyn and surrendered himself to District Attorney O'Dwyer. After he talked with Mr. O'Dwyer he testified before the grand jury in Brooklyn. He also testified before a grand jury in Sullivan county against one Gangy Cohen and on the latter's trial.

He was not cross-examined by counsel for Lepke whose name he had not mentioned in his testimony. On cross-examination by counsel for the other defendants, he said that the Rosen murder was the only one in which he took part. He testified that he had helped dispose of a dead body by burial but had not been present when the deceased, one Yuran, had been killed. He testified that at the trial of Gangy Cohen in Sullivan county for the murder of one

Walter Sage he had testified truthfully to what Gangy Cohen had told him in Los Angeles, Calif., but admitted that he had testified falsely as to some matters because he did not wish to give information to the "mob" all of whom had not as yet been arrested; that someone in the District Attorney's office, he could not recall whether in Kings county or Sullivan county, had told him not to tell everything for that reason. Apparently the matters about which he did not tell the truth were those involved in the Yuran murder case and the instant case. The indictment in the *Yuran* case had not been tried at the time Bernstein was cross-examined in the *Gangy Cohen* case.

It is of moment that the attorney for Gangy Cohen who cross-examined Bernstein in Sullivan county was the attorney for Philip (Farvel) Cohen, one of the defendants in this case, who has not yet been tried and whose name has been mentioned from time to time (*supra*). At the time of the cross-examination in Sullivan county there were many [fol. 4041] witnesses who were not under the protection of the District Attorney and many fugitives at large. Bernstein's direct examination in Sullivan county in the *Gangy Cohen* case as to the conversation which he had had with the latter in California took from three to five minutes. His cross-examination by counsel for Gangy Cohen and Philip (Farvel) Cohen took three or four hours. These facts were elicited in the instant case by the District Attorney undoubtedly for the purpose of arguing to the jury that the cross-examination during the Gangy Cohen trial as to facts affecting the Yuran murder and the Rosen murder, which apparently involved members of the so-called "mob," was to learn about other cases for future use and that there was some justification for Bernstein's concealment of facts. That of course could be no excuse. Be that as it may the facts involving Bernstein's concealment in this regard were placed squarely before the jury. It was for them to weigh the question of whether Bernstein testified truthfully as to being the driver of the murder car in this case and as to the others whom he named. The trial court charged before taking up the facts: "Let me say at the outset of this, please, scrutinize with suspicion and accept with caution and in a degree which accords with the character and extent of the impeachment, the testimony of each witness, and give due weight to all believable evidence

put in by the other side which tends to contradict or discredit it. Then decide if you can, is the witness telling the truth now. Put your brains to work on that, because you will need them." We are not the jury and we cannot say that this testimony was unbelievable as a *matter of law*.

There was another instance of falsification in Bernstein's testimony to which I shall refer. He was kept in a hotel and he said that no communication was permitted among those who were kept there or with the outside world. It was shown that he wrote three or four letters threatening his former partner that unless Mrs. Bernstein received the sum of \$200 he would inform against him. Bernstein then admitted that he had written the letters. They were not received in evidence after that admission. The court took the position that having admitted his untruthfulness, his credibility was impeached and the letters were irrelevant. The court said the witness had "lied." This ruling was correct but even if incorrect did not constitute reversible error.

The defendant Buchalter called several witnesses to testify to the financial condition of the deceased, and of the N. Y. and N. J. Co. Among those witnesses was one Nat Sobler, an associate of Rosen and secretary of that company. Rosen had been vice-president. He testified that Rosen put no money into the company but brought in the Pennsylvania accounts; that when the stoppage occurred in 1932, to which reference has already been made, Max Rubin told him that he (Sobler) and one Bluestein were to have the New Jersey knee pants business and the New York accounts; that Rubin said that that was what the witness was going to get and that he would have to take it; Sobler [fol. 4042] said that when he heard that, he fainted; that Rubin told him "*That you are going to get and no more.*" Sobler testified that the stoppage began about Monday and that Rosen quit N. Y. and N. J. Co. on Saturday; that on that day Rosen said he was getting a job with the Garfield Express at \$100 to \$125 a week; that Rosen said "*Louis Buchalter, or Lepke, got in as a partner there and he told Louis Cooper to take me back to work.*" It will be remembered that this was a witness called by Lepke who, to the extent indicated corroborated Rubin, the chief witness for the prosecution.

LAW

It is urged that the court committed error in its charge that the jury could reconcile the testimony of Rubin, Bernstein and Berger in connection with the conduct of Lepke and the so-called preparatory work on September eleventh. The point is this. The witness Rubin testified that on that day he saw Lepke at No. 200 Fifth avenue at about one o'clock in the afternoon. Lepke then complained that Rosen was again talking. Rubin said that he would see Weinstein. That he did and later reported to Lepke that Weinstein could do nothing. Rubin testified that that report was in the early part of the afternoon and that then Lepke told him to send Berger to him. Rubin said he gave Berger the message at a time which may have been about two hours after his talk with Lepke and thus well on in the afternoon. Berger testified that he saw Rubin at Union Square at about five p. m. and then walked uptown to Lepke's office; then that he and Lepke went downtown where they met the defendant Weiss at about six or six-fifteen p. m. and Lepke then told Berger to point out Rosen to Weiss. So much of Berger and Weiss. Now the defendants turn, in support of their argument, to the testimony of Bernstein. He testified that he was in his automobile at Sackman street and Lavonia avenue with Strauss at a time between twelve forty-five and one-fifteen p. m., when the defendants Weiss and Capone and Philip (Farvel) Cohen came up and called Strauss from the car; that they left him (Bernstein) seated in his car and returned three-fourths of an hour later. Strauss then told Bernstein, in the presence of the others, to "steal a car and get a drop." That would be about two p. m. The complaint of the defendants is that the court charged, after referring to the argument of one of the counsel that the testimony did not "hitch," as follows:

"Gentlemen, I refer you to the record because I don't want you to get twisted up on that. There is not a particle of evidence in the case as to when, *if at all*, Buchalter communicated in reference to the preparation work. *The case is blank on that. There is no way of knowing.* We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received

the alleged instructions to steal car and hire a drop, which was earlier in the day. Taken in connection with the other [fol.4043] facts, or alleged facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit. Apparently, in the *argument that was offered*, counsel assumed that Buchalter waited until after the fingering before he gave the instruction; but under the record I charge you you are entitled to consider whether or not, at the time of the alleged excited statements by Buchalter during the day, that may be taken as evidence connecting him with either previous instructions or instructions immediately thereafter in connection with the hiring of the drop and the stealing of the car. *I don't say you have a right to draw an inference that he sent such an instruction over the telephone*, but I do say you have a right, if you see fit, to reconcile the testimony by Rubin and by Bernstein and by Paul Berger on the various points of evidence they have testified to in connection with Buchalter and the preparation work on that day, and that the definite hook-up if true, is the fingering plus the declaration by Buchalter. I feel that for accuracy I should refer to the record on this, so that you won't be misled." (11717-20.)

The court then read questions and answers from the testimony and then said: "Now, gentlemen, in going over the text, those are the only questions and answers that I can find covering that point in the direct. It is possible that I have overlooked something that is in the cross. I will be glad to instruct you on that by a quote if my attention is called to it, but, so far as the time element is concerned, you will note there is nothing there to indicate whether or not Buchalter had contacted in preparation, with the Brooklyn end, for the proposed murder before or after Rubin ran in on him and found him in that state and making those declarations, if that testimony be true—and please remember what the Court said to you about that—no speculation."

Exception was taken to that portion of the charge upon the ground that there was an assumption implicit in the statement that there was an earlier communication between the defendant Buchalter, and somebody else about preparatory work. Further exception was taken because under it the jury had been asked to speculate. The court then said

he would straighten the matter out recalled the jury and charged as follows: "My attention has also been called to a possible confusion in my charge as to the possibility of a communication having been, even before that, given by Buchalter to somebody in Brooklyn to go ahead with the work of preparation. That would make it, of course, entirely consistent with the time table set up by Bernstein as to when he was given instructions to steal the car and get a drop. I want to correct any possible mischoice of language that might cause a misunderstanding. The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the *argument of one of the counsel* for the defense in attacking the ~~time~~ tables as told by Bernstein as inconsistent [fol. 4044] with Rubin's testimony and Berger's testimony is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—and I think this is accurate and will not be error that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the *argument* attacking the time table fails. I am not afraid of that charge. There is an exception to all of the defendants on this modification."

That which the court said failed was the "*argument* (of counsel) attacking the time-table." In effect what the court said was that there was no presumption either way. That was correct.

Both the charge and portion "straightening it out" were correct. "It is elementary that, in all cases of conflicting testimony, the first step in the process of inquiry should be to ascertain whether the apparent inconsistencies it presents may not, without violence, be reconciled." (2 Moore on Facts, § 1142, p. 1280.) Accordingly, "Juries are constantly instructed to reconcile evidence, where they can do so, without the imputation of perjury of any witness." (*Savannah etc., R. R. Co. v. Gray*, 85 Ga. 825, 829, per Chief Justice BLECKLEY.) We have said that it is the duty of the jury "to reconcile, if possible, conflicting statements as to material facts." (*Smith v. Lehigh Valley R. R. Co.*, 170 N. Y. 394, 400-401.) Here the statements were reconcilable, and if reconciled, were consistent with the testimony.

Surely, the court properly charged that the jury should endeavor to reconcile the testimony of Rubin, Berger and Bernstein. It may very well be that Lepke, due to the anger in which Rubin found him at about one p. m. on September 11, 1936, had already sent word to Weiss and Capone that Rosen was to be silenced. It may be that Strauss and Capone and Weiss had their own reasons for telling Bernstein to steal a car and get a "drop" and that those reasons had nothing to do with the slaying of Rosen. Later on that day, when Berger and Weiss had their instructions from Buchalter as to the slaying of Rosen, the previous order to Bernstein to steal a car and get a "drop" may have been made to fit into the new plan. A jury could have so found. In that event or in the event that the jury found that Buchalter had set the machinery in motion before Berger was sent to him, or even before talking with Rubin, the testimony was reconcilable.

That Bernstein did not know that the automobile he was told to steal was to be used for a murder is made evident by his answers that if he had so known he would not have permitted Muggsy Cohen to take the radio out of the car. After the murder he searched out Cohen, obtained the radio, broke it into pieces and disposed of it. For the same reason he said he would not have taken the handle off the door of the car and had a key made for it. He said he thought the automobile was to be used in a "schlamming" (striking on the head with a lead pipe).

[fol. 4045] It is urged that it was error to permit Rubin on re-direct examination to give an affirmative answer to the question, "Did you give untruthful answers to Mr. McCarthy due to fear of Lepke on your part because of the fact of having been shot, following your testimony before the Dewey Grand Jury?"

Here was a witness who had made untruthful answers to an Assistant District Attorney's questions. He had been shot through the head four days after his testimony before the grand jury either because, as the defendant Weiss stated to Berger, "We got some information that Max Rubin is squealing and he has got to be hit" or as the defendant Capone told Magoon, "Rubin is hurting Lep and we got to hit him in the head and get rid of him." He had been one of the intermediaries between Lepke and Rosen. There had been a scene in the court while the jury was absent in which Rubin had lost control of himself when asked for

the reason for his untruthful answers to the Assistant District Attorney. The court felt that counsel was seeking to provoke an outbreak in order to move for a mistrial. It was to prevent a further outbreak that the court framed the leading question which the District Attorney was to ask. There was nothing objectionable in that question. It was necessary and proper for the District Attorney to elicit the reason in the witness' mind for his conduct. The "impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it." (3 Wigmore on Evidence [3rd ed.], § 1044, p. 737.) As the court said in *People v. Chapleau* (121 N. Y. 266, 277): "Here the witnesses, in testifying to facts, of which upon the preliminary examination they had denied knowledge, or which they had suppressed, may have been moved or deterred as they swore they were by motives of fright; and they appear to have been perfectly free from improper instigation, or motives to swear falsely. At any rate, it was for the jury to decide whether they were to be believed or not." See also, *People v. Weldon* (111 N. Y. 569, 576).

The important factor was the reason which operated upon Rubin's mind. That reason might be a good one or a poor one. It might have a foundation in fact or no foundation at all. The fact that it was in Rubin's mind was no proof that it had any foundation. All it was offered to prove was that that reason, good or bad, motivated the conduct of the witness. In this instance he had testified before the grand jury and had been promptly shot through the head. He believed that Rosen had been killed because he had not kept quiet. He believed that that killing had occurred pursuant to the orders of Lepke. Lepke had told him that the *Rosen* case was to be taken away from the Assistant District Attorney who was even then examining him and given to another and that the latter was to be given other work and sent to another building; that the *Rosen* case would die. It was Rubin's state of mind that was being inquired into. That state of mind was no proof that Lepke had anything to do with the shooting of Rubin. [fol. 4046] No one claimed it was proof of that fact. But that belief did enter into the mind of Rubin and that was the reason he did not tell the truth to Assistant District Attorney McCarthy. The question was a proper one.

It is said in the dissenting opinion: "On request of counsel for Capone, the trial judge said to the jury: 'I will charge that unless they believe the testimony of Bernstein connecting Capone, that Capone must be acquitted.' The gist of such connecting testimony was the ungarnished word of Bernstein that the getaway route over which he drove the murder car had been taught to him by Capone the day before the killing of Rosen."

We think that there was more than that and that it is unfortunate that error must be predicated upon one sentence occurring at the end of two interdependent paragraphs contained among the requests to charge *and having application to but one defendant*. The context containing the one sentence which is said to be error is found in full on page 22. Especially is this so when this sentence was uttered by the trial judge in order to be fairer to the defendant Capone than his counsel requested. If the court had stopped with the words "I so charge" the defendant Capone would have no complaint to make.

First as to the facts. Bernstein's testimony in brief was as follows: On the Friday before the Rosen murder he was at Sackman street and Livonia avenue in his automobile talking with Harry Strauss. Along came *Louis Capone*, Mendy Weiss and Philip (Farvel) Cohen (a defendant as to whom there was a severance). Harry Strauss was in the car with him. They called Strauss out of the car. Mendy Weiss spoke to Strauss. Before Strauss stepped out he told the witness to wait around and not to go away. *Capone* had introduced him to Cohen and Weiss a year before. In about three-quarters of an hour they all came back and Strauss said "Steal a car and get a drop." Strauss asked if he could get one and when he answered "Yes" Strauss said "After you get that, come over tomorrow afternoon at four o'clock on Sackman Street and Livonia Avenue, I want to see you." He went away and rented a "drop" at Lincoln place and Ralph avenue at eight dollars per month.

About one o'clock the following morning he stole an automobile in the East Flatbush section with Muggsy Cohen, a car and radio thief. They stole a black, two-door chevrolet. They drove it to the "drop" and Muggsy took the radio out. On Saturday morning he took the handle off the door and had a key made. He then had an appointment at

four p. m. on Saturday at Sackman street and Livonia avenue with *defendant Capone* and Strauss which he kept. *Capone* asked if he had the automobile in the drop and then what kind of car and complained of the fact that it was a two-door car. Then *Capone* said "Come on, I will show you the job you have to do." Then *Capone* showed him the route; *Capone* said: "Now watch—this is going to be your job, what to do." As they drove, he showed the witness [fol. 4047] the candy store (Rosen's) and said: "Here is where somebody is going to be killed." He showed the route through the various streets to Van Sinderen and Livonia avenues. *Capone* went over the route seven or eight times. *Capone* said "This is the place where you drop the car off." Then they went back to Sackman street and Livonia avenue. Strauss came over and *Capone* told him to steal plates—to make sure to take plates at a place where the car would not be missed and after the plates were on to bring the car at ten-thirty o'clock that night to Sackman street and Livonia avenue. He left his automobile with *Capone* after taking out a flashlight, a screwdriver, a pair of pliers and a pair of gloves. He broke into a garage and stole plates. He put the plates on the car he had stolen, broke up the old plates and disposed of them. He waited around and then drove the stolen car to Sackman street and Livonia avenue. He parked it a few doors away and it was inspected by Weiss, Strauss and *Capone*. Weiss started complaining: "What the hell is the matter with you? Why did you get a two door car for?" "You know for a job like this you need a four door car."

After Rosen had been shot Weiss and Strauss came running from the store and with Ferraco jumped into Bernstein's car. He drove along the route to Van Sinderen and Livonia avenues. He took the key out of the car and all four stepped out and walked over the bridge down into Junius street. There *Capone* was waiting with Bernstein's car and Cohen had his own car. Weiss gave the witness his gun and told him to break it and throw it away. *Capone* told him to take Ferraco and drop him off and *Capone*, Weiss and Strauss went away in Cohen's car.

The portion of the charge containing the sentence quoted is as follows: "*Counsel for Capone*: I ask your Honor to charge the jury that in so far as the defendant *Capone* is concerned, even if they were to believe the testimony of

Solomon Bernstein, if they disbelieve the testimony of Seymour Magoon, they must acquit. The Court: I have already charged that and, as the jury knows, I have gone particularly into that point. It is all up to the testimony of Seymour Magoon. Do you believe it? If you do believe it, it is one thing; if you do not believe it, it is another. Counsel for Capone: May I have the converse of it in the next request? I ask your Honor to charge the jury that in so far as the defendant Capone is concerned, even if they were to believe the testimony of Seymour Magoon, if they disbelieve the testimony of Solomon Bernstein, in so far as it affects the defendant Capone, they must acquit. The Court: I so charge. That is obvious. Wait a minute. I am a little puzzled about this language as being sufficiently definite as a confession in case Bernstein is not believed. The language is that when that witness was talking to Capone, Capone replied, 'What are you worried about? I worked on the Rosen thing, which was right on Sutter Avenue, and I was not made.' I think that is too indefinite. I will charge that unless they believe the testimony of Bernstein connecting Capone, that Capone must be acquitted. Counsel for Capone: There are just a few more. * * * The charge was correct.

[fol. 4048] It is next urged as error requiring reversal that the court failed to analyze the evidence in the case so as to present to the jury fairly the conflicting claims of the People and the defendants but on the contrary expressly disavowed that duty. The case cited is *People v. Montesanto* (236 N. Y. 396). The last paragraph is no doubt the reason for the citation. We do not think it is justified by the paragraph in question which reads as follows: "In our opinion, *in view of these two matters, taken in connection with the failure of the court generally to analyze the evidence in the case so as to present to the jury fairly the conflicting claims of the People and the defendant, the latter was not accorded a fair trial.*" (p. 407.) That is as far as we have ever gone. Surely it must depend on all the circumstances of the particular case.

We shall now quote the language of the charge upon which defendants must rely in support of this contention:

"Questions of law are for the Court. It is not the purpose of the Court, in making any allusions to evidence, to do so for the purpose of refreshing recollection or particularizing in order to emphasize one point as against another.

You heard the witnesses. You heard the evidence exhaustively discussed by counsel. The Court placed *no time limitation* upon the discussion, simply tried to preserve order and dignity, two qualities which are inherent in the administration of justice, and which it is the duty of the Judge to do.

It is the record of the evidence that counts, and that is left to your memory, to be refreshed in such particulars, if any, as you may desire, by a re-reading of minutes on any particular point, should that be necessary."

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"These three defendants are tried together because that is provided for by a statute of this State. We cannot question the wisdom of that statute. It was passed by the Legislature and signed by the Governor. It is the law. But that does not lessen your responsibility in seeing that the evidence as against each is properly segregated and applied only as to him.

"I shall have to later come back, and in a sort of away which I hope will be fair, attempt to point out certain parts, possibly the bulk, possibly all of the points of evidence in connection with the defendant or defendants to whom they apply. I will do that as a safeguard against your own confusion, but when I do it, remember it is your own recollection of the record that counts. Try as hard as I may to be fair in epitomizing for the purpose of segregation from, as I said, approximately a million words of record, I do not guarantee it to be true, because I cannot give assurance against the human frailty of making mistakes."

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"Now, gentlemen, I don't like to review testimony in a long record. I don't think it is humanly possible, with this enormous amount of text, for a judge to do this, no matter how fairly he tries to do so, without being accused of trying to color it.

[fol. 4049] Just as with an anthology, any epitomization of record is terribly personal with the person who prepares the epitomization. I know it has to be done in some cases. *I will do it if counsel for the defense request it.* This has been a long trial. Witnesses have been put on in certain order. I don't know how much of the record you remember and how much you don't. A lot of it has been discussed in the summations from the viewpoint of counsel who

argued. However there are certain points of the evidence to which I feel under the necessity of calling your attention, first, because where more than one defendant is tried for a crime and the evidence is different as against the different defendants in its applicability, there should be some sort of an attempt at segregation by the Court as an aid to you *otherwise you might apply evidence against one defendant as against the others, and that would be unfair. That is the purpose of this epitomization.* Please do not gain any impression that it is warranted to be perfect. It is simply intended as a fair summary, and, I hope, a substantially accurate one.

"Also, I express no opinion as to the believability of any of the witnesses on any of the points mentioned.

"Also, this particular summary is not a general one, it is merely a segregation of evidence to *keep you from misapplying it as against certain defendants.*

"The believability of any witness on any of the points mentioned is your job to decide, and I do not go into details of cross-examination because that likewise is your job. These are references purely. Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, is largely hit or miss; it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute.

"Unless, there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it.

"Let me say at the outset of this, please scrutinize with suspicion and accept with caution and in a degree which accords with the character and extent of the impeachment, the testimony of each witness, and give due weight to all believable evidence put in by the other side which tends *to contradict or discredit it.* Then decide, if you can, is the witness telling the truth now. Put your brains to work on that because you will need them."

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"So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business

grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business apparently, and the grudge relating particularly to Rosen's severance with the business, and apparently blaming Buchalter for it, Buch-[fol. 4050] alter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities. That is enough as motive evidence, if you find these facts to be established to your satisfaction reasonably, but I charge you that motive need not be shown if the case is otherwise sufficient. When I mentioned Weiss and Capone, please bear strictly in mind what I said at the start, that this is purely a segregation to guide you against *misapplication of evidence as against defendants to whom it does not apply*. It is not a discussion of evidentiary values; it is not an expression of belief by the Court as to whether or not you shall accept such testimony as true. For that reason there is no review of cross-examination or of any of the evidence on the several defendants' side of the case. It is strictly and only a segregation."

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"Now as to Capone—and please pay strict attention, gentlemen on this point; it is quite important. In mentioning the points of evidence applicable to *this defendant, Capone*, I particularly wish to impress upon you the comparative paucity of the corroboration from non-accomplice witnesses so that you won't confuse the evidence applicable to the others and use it against Capone. Most of the evidence as against his defendant came from the accomplices Berger and Bernstein."

"Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration. You will have to ask yourselves, 'Is it true?' Possibly it would be better in view of the great importance of this feature of the case, if, instead of depending on what I have just said, I use just a few minutes more and refer to the exact text of the record, because this must not be carelessly decided; it must be intelligently decided."

Then the court read questions and answers from the record, giving the page numbers at which they occurred. The

questions and answers so read take approximately five pages of the charge. Then the court continued:

"Gentlemen, I think that is the text applicable thereto, unless there was something on cross-examination applying to it. You see how it is limited down. It is limited down on corroborative points to what Magoon, the non-accomplice witness, said was his conversation with Capone in which he alleges Capone made reference to the Rosen matter and that he had not been made, and then you have the alleged complicity, according to the testimony I have just read, testified to by Magoon, who is a non-accomplice witness. These are two non-accomplice witnesses."

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"If, under the strain of this trial, there has been any evidence of nervousness or strain on the part of counsel or Court, if there have been interchanges which may have shaken the decorum of the court-room, if there have been argument and recriminations which may seem unnecessary, please overlook and disregard them in coming to your verdict. This includes the Court. The Court is human. It has to be strict, in accordance with the responsibility of its job, whether it likes to be strict or not, but if I have spoken sharply at any time, just forget it. The Court is trying to be fair. It is trying not to express any opinion or to give any impression as to what its own notion is concerning the guilt or innocence of any of these defendants. It is trying to see that the case is kept within reasonable bounds, although it has given a great deal of latitude in this trial. It is trying to see that the jury has it fairly and fully presented as a case so that it may properly decide it.

I charge you that the law presumes every defendant innocent unless proven guilty beyond a reasonable doubt, the language of the statute being: 'A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.' "

I referred (*supra*), to the defense interposed by the defendants and to the witnesses called by them in order that I might refer thereto at this point.

This claim of error comes to this: there should be a reversal in this lengthy trial where the guilt, at least of Lepke

and Weiss was clearly established, because after eleven weeks of trial the court did not analyze the evidence so as to present the conflicting claims of the defendants and the People. We have never before said that that was indispensable or constituted reversible error. However, we shall now examine the conflicting claims.

As to the defendant Capone the court told the jury of the "paucity of the corroboration from non-accomplice witnesses" (*supra*), and read the questions and answers relating thereto from the record. Capone had not testified and had called no witnesses. What were the conflicting claims of the People and Capone which should have been analyzed? The defendant claimed to be not guilty and the prosecution witnesses to be untruthful and those claims were surely known to the jury.

As to the defendant Weiss, his defense in substance was an alibi. The court properly charged as to that defense.

As to Lepke his defense was that he was not guilty, that the deceased was of too little importance for him to direct or order his death and that certain conversations testified to by prosecution witnesses had not occurred. I have quoted from his counsel's argument to the jury to indicate that the jury understood that Lepke claimed to be innocent and that Rosen was so unimportant that there was no reason or motive for Lepke to direct his death. His counsel argued at length upon the fact that the prosecution witnesses who testified to conversations in the rooms at No. 200 Fifth avenue were unworthy of belief. His counsel's summation covers one hundred and three pages of the record. The claims of Lepke were before the jury during the whole of the long trial. Of the facts presented here we do not find any error affecting the substantial rights of defendant Lepke in the failure of the court to analyze his claims after [fol. 4052] they had been presented at such length by his counsel prior to the charge. On the contrary, so weak was his defense that great harm might have been occasioned to Lepke if the court had attempted to analyze the testimony of the witnesses called by him.

We shall now examine the corroborative evidence as to Capone which is discussed in the dissenting opinion.

Magoon testified that in April, 1939, Capone spoke to him with reference to one Friedman. A few days later Magoon saw Capone at the latter's home and asked him "if he thought it was advisable that I work on the Friedman thing

because I hung out about a block away and I thought I would be recognized" to which Capone replied: "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made" (identified).

Cross-examination developed little on this phase. After detailed questioning of Magoon on matters affecting credibility the court said that the witness "has already admitted previous crimes, a number of murder combinations and various crimes, it looks to the Court as if it comes down to a flat foot proposition whether or not the jury will, notwithstanding the facts just mentioned, believe he is telling the truth in this particular occasion concerning this particular crime. That is all. The jury requires no further persuasion he is a criminal or that he is a murderer."

Counsel for Capone argues that that could not be considered as corroboration, and I shall take that up later, but assuming for the moment that it could be so considered, he says that that was the only item in Magoon's testimony which could be so considered. Therefore, he argues, that the court erred when it submitted the item which may be referred to as the participation of Capone in the "tailing" of Rubin by Magoon in preparation for another attack on him and Capone's statement on an occasion when Magoon was reporting thereon, "That Rubin is hurting Lep. We have got to hit him in the head and get rid of him." Originally the court submitted those two items, saying: "Those two items, as I have said, are the only evidence from non-accomplice witnesses which can be submitted on the question of corroboration."

As to the complicity of Capone in the "tailing" of Rubin for what the court referred to as the second attempted assassination, I think, it could well be argued that that was corroboration of the testimony of Bernstein and Berger because it evinced consciousness of guilt of Capone in that, knowing that he, Buchalter and Weiss were all implicated in the murder of Rosen, it was necessary for Capone to become concerned in the spoliation of evidence against anyone of those three because what might become harmful to Buchalter might lead thereafter to the apprehension and conviction of Capone. A jury might find that when Capone put it upon the ground that the witness was to be destroyed because he was hurting "Lep," Capone was thinking of himself but using the name of one of the other guilty men rather than his own name.

I do not think that is necessary so to argue here because of that which occurred during the requests to charge and [fol. 4053] which, I think, disposes of this item of the "tail-ing" of Rubin for the purpose of having him killed. The following I quote: "The Court: 40, I had this penciled notation: There is also testimony of Magoon as to Capone being involved in preparation for intended assassination of Rubin. Counsel for Capone: I intend to except to that. I don't want—with your Honor's permission—The Court: The way you frame this, if you want to read it, go ahead and read it. Counsel for Capone: 40. I ask your Honor to charge the jury that the only alleged corroboration of the accomplice Solomon Bernstein's testimony in so far as the defendant Capone is concerned, is the alleged oral statement made by the defendant Capone to Seymour Magoon in the year 1939, at the home of the defendant, in which the defendant is alleged to have stated, 'I worked on the Rosen thing right on Sutter Avenue, and I was not made. I hung around there too. What are you worrying about being made?' The Court: Denied. Counsel for Capone: Respectfully except. I ask your Honor to charge the jury, in so far as the alleged statement which I have just read is concerned, that the jury has no right to speculate, surmise, or add to such alleged statement, but if they believe same must determine that in their opinion it is sufficient independent evidence tending to connect the defendant Capone with the crime charged, or they must acquit. The Court: I will have to think about that one. Now you are getting into a deep question of law. Counsel for Capone: That is why I said to your Honor I did not want to read it out loud. The Court: I will so charge; that the alleged preparation, if it occurred, in which Capone is alleged to have participated, for the second attempted assassination of Rubin, is of value only in connection with and in event of the declaration previously alleged to have been made by Capone being truthfully testified to by Magoon. Counsel for Capone: *Thank you very much.*"

That, it seems to bring the corroboration, under the charge down to the one item of conversation in which Capone said that he had worked on the "Rosen thing" and had not been "made" and thus that Magoon need not worry about the "Friedman thing."

Counsel for Capone argues that in order to have that corroboration of the story of the accomplices, the jury must

have found that the words "on the" means "implicated in" and that the "Rosen thing" mean the "Rosen murder."

We shall assume that to be correct. That was for the jury. The sentence must be read in the light of its setting. Murder is a harsh word. No doubt murderers prefer to use another word. "Implicate" is a lawyer's or a judge's word and not that of a Magoon or a Capone. It was well said in *Weathered v. State* (129 Tex. Cr. 514), which was in turn quoted in *Wigmore on Evidence* ([3rd Ed.] Vol. VII, § 2094, p. 473): "We cannot agree that it is proper to so mutilate a statement made. The setting of a word or words gives character to them, and may wholly change their apparent meaning." In *Towne v. Eisner* (245 U. S. 418, 425), HOLMES, J. said: "A word is not a crystal, trans-[fol. 4054] parent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Let us examine the circumstances and time: (1) Capone, on the day before the murder took Bernstein in an automobile, passed Rosen's candy store on Sutter avenue and said "Here is where somebody is going to be killed;" (2) he showed Bernstein the route to be taken after the murder seven or eight times; (3) in making the quoted statement, Magoon was talking of "work on the Friedman thing" which was to take place "sort of off Sutter Avenue" and Magoon "hung out about a block away;" (4) Capone then said "What are you worried about? I worked on the Rosen thing and it was right on Sutter Avenue and I was not made;" (5) Rosen had been shot and killed on Sutter avenue.

It was for the jury to say under section 399 of the Code of Criminal Procedure whether Capone's statement to Magoon tended to connect him with the commission of the crime. Counsel argues that it would not and says: "The conversation could only be admitted as a circumstance to be considered in determining whether the defendant was implicated in the crime, and would, like other circumstantial evidence, have to lead irresistably to a conclusion of guilt, to the exclusion of every other reasonable hypothesis to the contrary to a moral certainty. (Wharton's on Criminal Evidence, [10th ed.] § 622-b; *People v. Bennett*, 49 N. Y. 105.) Otherwise, it would not constitute corroboration." That is not the rule as to corroboration. (*People v. Reddy*, 261 N. Y. 479, 484; *People v. Kress*, 284 N. Y. 452, 460;

People v. Cohen, 223 N. Y. 406, 426; *People v. Elliot*, 106 N. Y. 288, 292; *People v. Hooglikerk*, 149 N. Y. 162; *People v. Everhardt*, 104 N. Y. 591, 594.)

Although that is not the rule, nevertheless, the court was asked to charge and did charge as follows: "Counsel for Capone: All right. I ask your Honor to charge the jury that if, after considering the evidence, they find it is susceptible of two constructions, one indicating the defendant Capone's guilt and the other his innocence, they must give the defendant Capone the benefit of the construction most favorable to him and must acquit him, and if the jury find that the two constructions are evenly balanced, then the People have not met the burden imposed upon them and the jury must acquit the defendant Capone. The Court: I take it, gentlemen, this goes to the question as to whether the language which is alleged by Magoon to have been used by Capone is susceptible of interpretation on the hypothesis of innocence. I have taken great care of Capone's end of the case because of the difference between the corroborative evidence as to him and as to the others. It is so limited in record content, I even went to the extent of quoting verbatim from the record, so there would be no mistake about it. You know the text. Of course, if you think that is capable of interpretation on the hypothesis of innocence, why, follow that and acquit him. If you think it hooks him up and it is not capable of interpretation on the hypothesis of innocence, and you believe Magoon in that [fol. 4055] testimony, then you have a right to consider whether or not it corroborates sufficiently to tend to connect Capone with the commission of the crime, the details of which, as against Capone, were testified to by Bernstein and by Berger, which go into considerable detail. Of course, if this alleged corroborative testimony is found to be true and so tends, you are entitled to convict. Otherwise acquit."

Let us return now for a moment to the quoted portion of the examination about the "Rosen thing". In *People v. Feolo* (284 N. Y. 381) the following was said by the defendant Brabson, "On a murder charge that happened about six years ago in New York City. I thought it blew over, but finally I am going back to New York on that charge." We were unanimously of the opinion that that statement

was a sufficient corroboration of the accomplice, if believed by a jury, and was sufficient to take the case to the jury.

Now we go back to the meaning of the "Friedman thing". The counsel in the case knew what working on the "Friedman thing" was. Counsel for Capone argued at one point in the trial, as follows: "May I add just one more thing before the jury comes back. I understand from other counsel, which I did not know, that this man (Magoon) is charged with the Friedman killing and they are going to bring it out on cross-examination, which would make the error still more harmful." Thereafter counsel for Weiss, asked Magoon the following questions and received the following replies: "Q. You helped to kill a man named Whitey Friedman, did you not? A. I drove the car on that occasion as well. Q. And you knew that Whitey Friedman was to be killed? A. Yes, sir. Q. When you drove the car? A. Yes, sir. Q. You knew what the job was that night, didn't you? A. Yes, sir. Q. And you drove the men who did kill Whitey Friedman to where Whitey Friedman was? A. The man who killed him. Q. The man who did it. And then you drove that man away, did you, after Whitey Friedman was killed? A. Yes, sir. Q. How was he killed? Was he shot? A. Shot."

In addition, Tannenbaum had already testified: "Q. In the Whitey Friedman murder, what part did you play? A. I fingered him."

Counsel for Capone argues in his brief that if the District Attorney should contend that Magoon in his question to Capone regarding the "Friedman thing" referred to a "Friedman murder": "Then Magoon's question would constitute proof of another crime, and the admission of this testimony would be error. (*People v. Molineaux*, 168 N. Y. 264; *People v. Dolan*, 186 N. Y. 4; *People v. Katz*, 209 N. Y. 311.)" The question of Magoon to Capone as to whether he (Magoon) should "work on" the murder of a man named Friedman, would certainly be no proof of another crime by Capone and the mere statement of the proposition is its refutation.

The defendant Weiss also urges that it was reversible error to receive the testimony concerning the alleged attempts of Weiss to have Rubin killed.

[fol. 4056] It appears that after the murder of Rosen, defendant Weiss stated, according to the testimony of

People's witness Berger, that "We got some information that Max Rubin is squealing and he has got to be hit." Magoon testified that after the Rosen murder defendant Capone stated "that Rubin is hurting Lep and we got to hit him in the head and get rid of him." These statements by defendants Weiss and Capone are some evidence that they feared the "squealing" of Rubin and that they feared they would be implicated if Rubin continued to "squeal" or to hurt Lepke. I have already indicated that Rubin was a key witness in the trial of the instant case, because of his position as a go-between Lepke and those who were affected by Lepke's union activities, Rosen for example. Rubin's past conduct in that capacity had been such that when Lepke thought it was best for Rubin to get out of town after the Rosen killing, he told Rubin to introduce Berger to the men from whom Rubin was collecting money for Lepke, evidently intending to use Berger as a go-between successor of Rubin. Defendant Lepke's efforts to keep the witness Rubin out of town, as indicated in Rubin's testimony, indicate that Lepke as well as Weiss and Capone realized the key position and importance of Rubin in case of the trial of any charge growing out of the Rosen murder, or any charge which might lead the District Attorney to the uncovering of those responsible for the Rosen murder. There was, therefore, clearly some evidence to indicate not only that all the defendants here were implicated in the shooting of the witness Rubin, but that that attempted murder was made necessary in their eyes by the murder of Rosen and the threats and grand jury testimony of Rubin. From their standpoint it was necessary to remove Rubin and so prevent him from testifying against them. This was in line with Lepke's statement to Mr. Maguire that, "If witnesses are not available, investigations collapse." It is true that the court charged that the shooting of Rubin and the subsequent "tailing" of him by Magoon was not to be considered against Lepke but might be considered, if believed, only against Weiss and Capone but that was a ruling favoring Lepke.

In *People v. Place* (157 N. Y. 584), the defendant was accused of killing her step-daughter and the prosecution was allowed to prove an assault by the defendant upon her husband, the father of the murdered girl. This court said, at page 598: "The prosecution was allowed to prove an

assault by the defendant upon her husband when he returned home, and when the death of Ida could no longer be concealed unless he was removed or his life destroyed. The demeanor, conduct and acts of a person charged with crime, such as attempted flight, a desire to elude discovery, an anxiety to conceal the crime, or the evidence of it, are always proper subjects of consideration, as indicative of a guilty mind, and in determining the question of the guilt or innocence of the person charged. (Citing cases)." In *People v. Thau* (219 N. Y. 39, 42), this court said, quoting with approval from an opinion of Mr. Justice BREWER (afterward an associate justice of the Supreme Court of [fol. 4057] the United States) in *State v. Adams* (20 Kans. 311, 319): "And, on the other hand, it is equally clear that whatever testimony tends directly to show the defendant guilty of the crime charged is competent, although it also tends to show him guilty of another and distinct offense. *A party cannot by multiplying his crimes diminish the volume of competent testimony against him.* A man may commit half a dozen distinct crimes and the same facts or some of them, may tend directly to prove his guilt of all; and on the trial for any one of such crimes it is no objection to the competency of such facts as testimony that they also tend to prove his guilt of the others." (Emphasis supplied.) See also, *People v. Peckens* (153 N. Y. 576, 594; *People v. Katz*, 209 N. Y. 311, 328-329). In *People v. Peckens* (*supra*), at page 594 this court said: "The contention of the appellant, that the evidence of other transactions by the defendant and his confederates was inadmissible, because it tended to prove that they were guilty of other crimes, cannot be sustained. It is well settled by the decisions of this court that while evidence of the commission of one crime is not admissible to establish a party's guilt of another, yet, that is not inadmissible because it tends to prove another crime if it is otherwise material and relevant. That such evidence is admissible where its purpose is to show intent or guilty knowledge, or where the transaction proved had some relation to or connection with the transaction upon which the indictment was based, or where it formed a link in the chain of circumstances or facts which led up to the transaction involved, we think there can be no doubt under the authorities as they exist in this state. (*People v. McLaughlin*, 150 N. Y. 386).

This case clearly falls within the exceptions to the general rule, and as the evidence was relevant to the issue it was not inadmissible simply because it tended to prove the defendant and his confederates guilty of other crimes."

In addition, we may say that the rule of *People v. Molineaux* (168 N. Y. 264, 291), is primarily applicable to a wholly independent crime when there is no connection between the two crimes. (*People v. Katz*, 202 N. Y. 311, 327).

Clearly Weiss' attempts to have Rubin killed were directly relevant to the issue on trial. In *People v. Spaulding* (309 Ill. 292, 302-306), it was said: "Evidence that the accused has attempted to destroy evidence against himself is always admissible for the purpose of showing consciousness of guilt, (*People v. Fox*, 269 Ill. 300) as is also evidence tending to show an attempt to bribe witnesses. (Citing cases). In *People v. Roberts*, 306 Ill. 240, evidence showing that the defendant arranged for a conveyance out of the state of the prosecuting witness and gave her money to remain away from the county during the trial was considered admissible for the purpose of showing consciousness of guilt. *State v. Keith*, 47 Minn. 559, 50 N. W. 691, and *Blair v. State*, 72 Neb. 501, 101 N. W. 17 are similar cases and the holdings are the same. In *Bowman v. United States* (267 Fed. 648), the defendant was convicted of murder. It was held proper to prove that he [fol. 4058] threatened to kill the only eye-witness to the murder and that he had assaulted the witness with intent to kill." When Rubin returned to the city in violation of Lepke's instructions Weiss told Berger "we got some information that Max Rubin is squealing and he has got to be hit. I want you to point him out to Schlermer and work with Schlermer." When Weiss was arranging for a second attempt to eliminate Rubin he said "Look how lucky the son of a b... is. He gets hit in the head and he is still alive. But we will catch up with him yet." Finally when arrested after flight Weiss said "I don't mind going back to New York except that I hate to sit between O'Dwyer and Dewey" and that "I had intentions of surrendering at a later date when O'Dwyer would leave office." He feared the squealing of Rubin because conscious of his guilt in the slaying of Rosen and desired to have Rubin destroyed.

It is urged that it was error for the court to charge: "The believability of any witness on any of the points mentioned is your job to decide, and I do not go into details of cross-examination because that likewise is your job. These are references purely. Cross-examination is almost impossible to correctly state in such a manner that two people can agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct is largely hit or miss: it is blank cartridge shooting. Once in a while you find it shown that a bullet had hit, but whether there is a hit or not may be a matter of dispute. Unless there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it."

We find no error in that charge. The cross-examination of the witness Bernstein, for instance, covered approximately five hundred pages. One cannot set out cross-examination as one can set out direct examination.

It is then urged that the following charge was incorrect: "There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns state's evidence. It is a proper method of prosecution and enforcement of the law. When rogues fall out, it is a wise man's delight; so while the court submits to you consideration of the testimony of witnesses who, by their own admissions and otherwise are impeached as professional criminals, murderers, thieves, perjurers, in the long run it comes down to this: Are they telling the truth now? If you are not reasonably satisfied that they are telling the truth now, you may not accept and be guided by their testimony, but if you are reasonably satisfied, having viewed with suspicion and accepted with caution their testimony, taking into consideration its impeachment, then you will be guided by it."

When exception was taken the court offered to withdraw it but counsel said he did not wish to be put in the position of asking the court to recall the jury for that purpose and *that it was one of those things that was unintelligible to [fol. 4659] him*. Nevertheless, after the jury was recalled the court said: "At one place during the charge I quoted an old saw, 'When rogues fall out, wise men delight.' That was intended to have general application. It was not intended as calling the defendants names, but, lest it be

misunderstood as having specific application to the defendants as rogues, the Court withdraws and apologizes for it. It was not so meant. Just disregard it."

Counsel for defendants confronted the People's witnesses with their testimony upon other trials. Many or all of them said in substance "if it is in the book it is so" or something similar (the word 'book' referring to the record on the cross-examination). In the charge the court referred to that as a normal response and used the sentence, "Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is an unholy thing. We have a court reporter here to supply daily minutes in this case because counsel forget overnight the questions and answers in text form of the day before, * * *." What the court said was helpful to the jury.

Defendants urge that they are entitled to a reversal because the court directed that the issues be tried before a special jury. The answer to that is that it is recited in the order granting the motion for a special jury that the District Attorney appeared in support of the motion and that each attorney for each defendant consented to the granting of the motion.

Defendants urge that they are entitled to a reversal of the judgment of conviction as matter of law because of the denial of their motion for change of venue to another county of the State, made pursuant to subdivision 2 of section 344 of the Code of Criminal Procedure. In our judgment there is no merit in defendants claim for a number of reasons.

In the first place, the defendants were tried before a special jury drawn pursuant to article 18-B of the Judiciary Law (Cons. Laws, ch. 30). Each of the defendants consented to be tried before such special jury. The statute (Judiciary Law, § 749-aa, subd. 2) provides, "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * * or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify

as a witness in his behalf shall not create any presumption against him." A similar provision was incorporated in Laws of 1886, chapter 378, and in Laws of 1901, chapter 602. The statute is constitutional (*People v. Dunn*, 157 N. Y. 528) and was properly applicable upon proof that the defendants had been indicted for the crime of murder in the first degree. (*People v. Hall* 139 N. Y. 184). The statute further provides, in subdivision 7, "The rulings of the trial court, how- [fol. 4060] ever, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final." Those provisions have been pronounced constitutional by this court. (*People v. Dunn*, *supra*; *People v. Wolter*, 203 N. Y. 484.)

The motion was addressed to the sound discretion of the court. We are not prepared to say on this record that its denial was an abuse of discretion. (*People v. Hyde*, 75 Misc. 407 [opinion by Mr. Justice LEHMAN, now Chief Judge of this court]; *affid.*, 149 App. Div. 131; *People v. Brindell*, 194 App. Div. 776, 781; *People v. Hines*, 168 Misc. 453, 470; *People v. Sarvis*, 69 App. Div. 604.) This may also be said with reference to the motions of the defendants Weiss and Capone for a change of venue and for a severance.

The guilt of the defendants Buchalter and Weiss was clearly established. The guilt of the defendant Capone depended upon whether the jurors believed the testimony of a witness who corroborated the accomplices. That witness was a criminal. The court properly left to the jury the question whether they would believe or disbelieve him. That was peculiarly a jury question. We cannot say that the jury was bound as a matter of law to disbelieve him.

The judgments of conviction should be affirmed.

LEHMAN, Ch. J. (concurring). Joseph Rosen was killed on September 15, 1936, in circumstances which leave little room for doubt that he was shot by a gang of criminals to promote the nefarious purposes of the gang. Almost four years later these defendants were indicted for the murder. The trial took place five years after the murder.

At the trial, witnesses, produced by the District Attorney, testified that they were members of a criminal combination, or gang, or, at least, had friendly and intimate relations with members of a criminal combination or gang which

preyed upon the public and which without hesitation and without questioning obeyed the orders of its leaders. According to their testimony violence and murder were ordinary methods of carrying out their criminal purposes. Some of these witnesses, confessed members of this hideously criminal gang, testified that they actually took part in the murder of Rosen in 1936. Others testified that though they were members of the gang and had callously taken part in other murders, they had no criminal connection with the particular murder of which the defendants have been found guilty. Still others, though denying criminal connection with the gang, claimed, or at least admitted, intimate business and social relations with the leader of the gang. Witnesses who had no relations of any kind with the gang or its leader, and whose credibility has not been impeached, showed the manner in which the killing was perpetrated and the circumstances surrounding it. Their testimony is not challenged, but it throws little, if any, light upon the identity of the killers, nor does it in any manner tend to connect the defendants with the crime or to corroborate the testimony of the witnesses who admit that they are professional [fol. 4061] criminals. The only testimony which might serve to cast upon these defendants even serious suspicion of complicity in the crime was given by witnesses who, as matter of law, were, according to their own admission, accomplices in this killing, or men who, according to their admissions were accomplices in other killings by the same gang or, at least, had intimate relations—guilty or otherwise—with its leaders. There can be no question that the only proof against these defendants comes from witnesses who in their testimony against these defendants proved their own guilt of the murder of Rosen and from other witnesses who, though denying guilty complicity in the Rosen murder admitted guilty complicity in other murders and hideous crimes.

The facts which the People claim were established by the testimony of these witnesses are exhaustively stated in the opinion of Judge CONWAY. It would serve no purpose to repeat them or, at this point, to analyze in detail their effect. I point out here only that in any discussion of the questions presented upon this appeal we should bear in mind that all the essential facts which the People claim demonstrate beyond reasonable doubt the guilt of these

defendants are proven, if at all, only by the testimony of degraded criminals whose credibility is impeached, if not completely destroyed, by a cross-examination in which they admitted a callous disregard of every law, human and divine—including the provisions of both the penal law and of the divine commands against bearing false witness against their neighbors.

The jury is the arbiter of the credibility of the witnesses and of the weight of the evidence produced by the People. It must determine whether that evidence proves the guilt of an accused beyond a reasonable doubt. Whether that evidence is sufficient to overcome the presumption of innocence and to remove all reasonable doubt of guilt is, nonetheless, a question of law which this court may, in all cases, review (*People v. Glurk*, 188 N. Y. 167), and when the judgment is one of death this court must also pass upon the question whether the verdict is against the weight of evidence and whether justice requires a new trial. (Code Crim. Proc., §529.) "While no one doubts that in the great majority of cases the character and credibility of witnesses and the believability of testimony should be left to the final determination of a jury, yet the fact that the statute imposes upon us the absolute duty of deciding whether a verdict in a murder case is against the weight of evidence would seem to make it equally plain that the law contemplates the possibility that a jury may be swayed or led into giving an unjust and unwarranted verdict and requires us to correct the error when it does occur." (*People v. Becker*, 210 N. Y. 274.)

An accused, however degraded, is entitled to a fair trial before an impartial jury to whom all competent and material evidence relevant to the charge has been presented and from whom all irrelevant evidence, tending to prejudice it against the defendant, has been withheld. The accused is entitled to demand that the issues of fact be submitted to the jury in a charge which correctly defines the questions [fol. 4062] upon which the jury is the arbiter and the rules of law which bind the jury and is calculated to assist the jury in its deliberations. These are fundamental rights of all accused, guaranteed by the Constitution and part of the freedom which this country is now desperately fighting to defend. To the extent that the trial court errs either in its rulings or in its charge or fails to safeguard the rights of the accused to a fair trial or intrudes upon the field

reserved to the jury and withdraws from the jury questions upon which the jury is the sole arbiter, the verdict of the jury is tainted and is not a conclusive finding of guilt.

We are admonished by the Legislature to disregard technical errors or defects or exceptions which do not affect the substantial rights of the parties. All of us heed that admonition and recognize wholeheartedly its wisdom. Sometimes, perhaps, we need more an admonition to remember that it is the jury, not the court which weighs the guilt or innocence of the accused, and that errors or defects which taint the finding of guilt by a jury indubitably affect the substantial rights of the accused even though the judges of an appellate court may be of the opinion that guilt has been clearly established. The trial of the defendants has been long. They have been zealously—even hotly accused by an experienced prosecutor, and they have been zealously—even hotly—defended by experienced counsel. Sometimes zeal greatly exceeded discretion. In such a trial it is not easy for the presiding judge to maintain decorum and to rule correctly at all times. Some lapses and errors are almost inevitable and such indiscretion of speech or conduct, though regrettable, are entirely venial. It is not the duty or function of this court to pardon or to censure; it is its duty to determine whether errors or defects, if any, have tainted the jury's verdict and may have deprived the accused of his right to a judgment of a jury of his peers, arrived at after a fair trial conducted in accordance with the law. After the court has determined that errors or defects are present, it must appraise their effect in their setting at the trial.

Errors and defects must be viewed and weighed as an incident of the trial and in relation to all the other incidents of the trial including all the rulings of the trial court. In weighing them the judges of the appellate court must, so far as they can, form a picture of the whole trial. They must endeavor to see that picture as the jurors saw it. Errors which loom large to a judge, learned in the law and trained to administer justice in strict accordance with the law, may be scarcely visible to the lay juror. On the other hand, some errors or defects and perhaps especially, those due to excess of zeal of court or prosecuting attorney may be too easily disregarded by an appellate judge who knows from experience the difficulty of restraining speech

and ruling correctly on all questions of law in the heat and hurry of a criminal trial.

The possible effect of error or defect upon the substantial rights of a defendant cannot be measured by any rule of [fol. 4063] thumb—determination there depends upon the judgment of each appellate judge, and often there is room for difference of opinion.

The errors and defects in this case are, it seems clear to me, many. Judge LOUGHRAN has set forth some which in his opinion cannot be disregarded. I agree with him that these errors and defects are present and these errors and defects and others shown by the record cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape punishment we affirm a judgment tainted with errors obtained through violation of fundamental rights. Only careful, I might almost say prayerful, consideration can remove that hesitation.

Upon such consideration I have found it impossible to accept the contention that the record presents few, if any, errors, and that any errors or defects that might conceivably be found should be disregarded as trifles, when weighed in the balance against the mass of evidence produced to establish the defendants' guilt though that evidence comes from a polluted source. With characteristic self-restraint, Judge LOUGHRAN has understated the fact that the proof against the defendants comes from the lips of witnesses of such "low, moral caliber" that "uncertainty concerning the guilt of the defendants is produced to such an extent as to render substantial and reversible an error of law which, under other circumstances, might be regarded as harmless." I shall refer briefly to that "uncertainty" hereafter. I content myself now with the statement that even if the proof were far stronger it would still remain true that "the question of substantial right is not the abstract question of guilt or innocence. A guilty man is entitled to a fair trial and a trial is not fair if the verdict may be related to errors in the judge's charge. Error is substantial when we can say that it tended to influence the jury." (*People v. Sobieskoda*, 235 N. Y. 411; opinion by POUND, J.) On the other hand, after consideration of the record I feel constrained to appraise the effect of the errors committed at the trial differently from Judge LOUGHRAN, and I shall state as briefly as I can the reasons for my conclusions.

I take up first the failure of the trial judge to analyze the evidence so as to present to the jury fairly the conflicting claims of the People and the defendants, and the complete omission by the trial judge of any "review of cross-examination or of any of the evidence on the several defendants' side of the case." The issue of the guilt of the defendants depends, as I have already indicated, almost entirely upon the credibility of the witnesses of the People. If Bernstein, Berger and Rubin honestly tried to tell the truth there could be no doubt of the guilt of Buchalter and Weiss and perhaps no substantial doubt of the guilt of Capone. I do not think that it is possible that the jury was misled into the belief that any substantial question was involved other than the credibility of these witnesses. True the defendant Weiss produced some witnesses to sustain his claimed alibi, but it is impossible, I think, to read this long record without reaching the conclusion that the [fol. 4064] jury undoubtedly understood that, in final analysis, the vital question which they were called upon to decide was whether the People's witnesses were truthfully fastening upon these defendants a guilty share in the murder of Rosen, or whether they were testifying falsely for the purpose of avoiding, in whole or in part, the penalty which they richly deserved for their own participation in that murder or in other murders. Some of the judges of this court may think that in the exercise of a wide discretion the trial judge should have pointed out to the jury those considerations which might tend to justify reliance upon the testimony of confessedly degraded witnesses, and those considerations which might lead to the conclusion that there is no truth in such witnesses. It is the function and duty of the trial judge to explain to the jury the questions of fact which the jury must decide and the rules of law which the jury must accept and apply. He must be accorded a broad discretion in the selection of testimony which might support the contention advanced by the parties and also the emphasis he should place in his charge upon the contentions of either party in order to make the issues clear to the jury so that it may not be misled after a long trial. A charge which refers to the evidence produced and the arguments advanced by one side alone may tend to mislead the jury into the belief that little can be said for the other side. That would at times constitute an abuse of

discretion so serious as to require a new trial in a capital case. I do not find that in this case the failure of the trial judge to review the cross-examination of the People's witnesses, or to review the evidence produced by the defendants could have such effect.

Argument not without weight might, indeed, be made that any attempt to present in the charge a statement or summary of the testimony of the witnesses produced by the defendants would inevitably disclose the lack of substance of such testimony. Nor is it clear that any review of the cross-examination of the People's witnesses would have been helpful to the defendants. The cross-examination of the important witnesses continued for days and no summary could be entirely satisfactory. The omission, even so, would be serious if in contrast the trial judge in his charge has referred to the claims of the People, and the evidence produced by the People in manner which would tend to impress upon the jury the strength of the People's case. I do not find in the charge such contrast. The trial judge was bound to refer to evidence of the People tending to show an admission of guilt or, at least, consciousness of guilt upon the part of individual defendants, in order to warn the jury that such evidence could not be considered against the other defendants. He attempted little more. At the same time, the trial judge explained why he did not review the cross-examination of the People's witnesses or refer to testimony which might be favorable to the defendants. I might wish that the charge had been different. I have concluded nevertheless, that the defect here, if any, could not have misled the jury and does not affect the substantial rights of the defendants.

[fol. 4065] There are some errors and defects which cause me far more concern. As Judge Loughran has, in my opinion, completely demonstrated, the trial judge erred at times in ruling on evidence and at times usurped the function of the jury to draw inferences from the evidence and to determine the facts. I shall refer in this opinion only to those errors and defects which are perhaps the most serious. (1) The exclusion by the trial judge of the letter which the witness Bernstein wrote while in custody with other witnesses, and (2) the charge of the trial judge concerning the "argument attacking the time-table fable." Though I do not refer to each of the other errors and

defects set forth in Judge Loughran's opinion because I consider them less serious, they are not to be cast aside completely. As Judge Loughran has pointed out, the ultimate question which we must decide is not whether any error or defect standing alone be sufficient to justify the conclusion that it affected a substantial right of the defendant, but rather whether the cumulative effect of the combination of errors and defects resulted in depriving the defendants of a fair trial.

An inordinately long trial was followed by long summation of counsel and the prosecuting attorney had the last word. The District Attorney admitted in his summation that the principal witnesses for the People were men of evil character and counsel for the defense did not attempt to picture the defendants as honest, law abiding citizens. The accusing witnesses and the defendants were, as I have said, members of a gang or, at least, had close relations with leaders of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer unless he had the genius of a Balzac. Counsel for the defense, of course, did not fail to point out to the jury that the witnesses for the People were, on their own admission, at least as bad as the defendants on trial and that the jury might infer that the reward offered to them for testifying as they did was a promise that they would escape the penalty for their admitted crimes. The prosecuting attorney was justified in attempting to argue in answer that such criminal gangs cannot be destroyed unless through fear of punishment and hope to escape extreme punishment, some members of the gang could be induced to confess in order to save their own worthless lives and to give testimony against other members of the gang. It is difficult, however, to justify the statement of the District Attorney in his summation: "Don't let anybody fool you with Christmas present nonsense. Gentlemen, the courts have confidence in the integrity and common sense of juries and jurors. Have a little faith in the integrity of the courts and the prosecutor as to what will happen to witnesses. Right now they are too valuable pieces of bric-a-brac to be dealt with as Lepke, Weiss and Capone would want." In those words there is implicit a promise which the prosecuting attorney could not properly or truthfully make that in due time the witnesses would receive their just deserts.

Conscious as I am that there can be no certainty of the guilty of these defendants since the credibility of the wit- [fol. 4066] nesses against them is so seriously impeached, and recognizing as I do that errors and defects at the trial are many, I still reach the conclusion that the verdict of the jury was not influenced by these errors and defects and should not be set aside because of them. The rulings of the trial judge in the admission and exclusion of evidence may have kept from the jury some evidence which would demonstrate the evil character of the witnesses, but the evil character of the witnesses was so clearly demonstrated by other evidence that additional impeachment could, I think, have had no possible effect upon the jury. Nor could any ruling or statement of the trial judge in regard to the bad character of the defendants make the jury more certain of the evil character of the defendants, for that had been overwhelmingly proven by other evidence. The verdict of the jury rests, it is plain, on the conclusion that the story of the People's witnesses is credible and furnishes proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. Some support for that conclusion may be found in testimony which is not seriously challenged concerning the previous relations of these defendants with the members of the gang and, in the case of Buchalter to a lesser degree with the murdered man. That testimony is far from sufficient to prove the defendants' guilt. It does not even tend to connect the defendants with the crime, but it is a circumstance which fits into the picture of the crime as drawn by these witnesses whose credibility has been irretrievably impeached. It justifies at least strong suspicion and jurors, quite naturally, are more prone to base a finding upon evidence otherwise lacking in force, but which tends to support a strong suspicion than are judges trained to decide questions of fact solely upon competent and relevant evidence. The jury has appraised the evidence and in my opinion it cannot reasonably be said that any ruling of the trial judge which is challenged on this appeal may have affected that appraisal.

True, as I have said earlier, the court in the charge instructed the jury as matter of law upon some questions of fact which only the jury had the right to determine, and I may add parenthetically that I doubt whether I would agree with the inferences drawn by the trial judge even if

he had been the trier of the facts. I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded. Even so, I conclude that in this case the errors viewed as part of a long trial could not have affected the verdict. It is difficult, perhaps impossible to avoid all error upon such a trial, but the vital question involved was so plain and the meaning of the challenged parts of the charge so obscure that I cannot believe that the jury was misled. It has found the defendants guilty, and though I might have been unwilling, if I had been a member of the jury, to concur in the verdict, I cannot as a judge say that the verdict is against the weight of the evidence.

I cannot refrain from repeating in conclusion that I find the errors and defects numerous and I have hesitated long in reaching the conclusion that they may be disregarded, [fol. 4067] especially since three of my associates are convinced and have argued persuasively that they affect the substantial rights of the defendants. I regret many incidents that occurred at the trial. I regret the summation of the prosecuting attorney and his remarks in the course of the trial. I regret some of the rulings of the trial judge. Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind. All that is immaterial if the jury is convinced of guilt on sufficient evidence and no errors and defects affected the verdict. Even if I were entirely convinced of the defendants' guilt I should vote to reverse if I found room for doubt that the jury would have reached the same conclusion if all error had been avoided. Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm.

LOUGHRAN, J. (dissenting):

~~Early on the morning of Sunday, September 13, 1936,~~ Joseph Rosen was shot to death in a store kept by him at 725 Sutter avenue, Brooklyn. A jury have found that the homicide was the result of a conspiracy among the three defendants—Buchalter, Weiss and Capone—and that the crime was murder in the first degree.

Buchalter was said to have feared lest Rosen make complaint against him to the District Attorney of the county

of New York. For that reason—as the People asserted—Buchalter had commanded Weiss to have Rosen done away with. There is evidence that Weiss killed Rosen with the aid of Capone, Harry Strauss, James Ferraco, Farvel Cohen, Paul Berger and Sholem Bernstein. Strauss, Ferraco and Cohen do not appear in this record either as parties defendant or witnesses. Berger and Bernstein testified for the People.

(1) The testimony of Bernstein is all-important. He was the chief of the prosecution witnesses. Put into direct discourse, his story in substance was this: In the early afternoon of Friday, September 11, 1936, Strauss, who was then accompanied by Cohen and Capone, met me on a street in Brooklyn where Strauss told me to steal an automobile and find a drop [garage] for it. I did this on that same day. On the next day—Saturday September 12—Capone pointed out Rosen's store to me as a place where someone was to be killed and then taught me a getaway route. Early the next day—Sunday, September 13—I drove the stolen car to the vicinity of Rosen's store, as Weiss had told me to do. I saw Weiss, Strauss and Ferraco walk toward the store. I stayed behind the wheel of the stolen car with the motor running. I heard a lot of shots. Weiss, Strauss and Ferraco ran from the store into the car. I started on the route Capone had shown me. I drove to Van Sinderen and Livonia avenues where we abandoned the stolen car. Capone and Cohen met us there with other cars.

These judgments of conviction necessarily rest upon the finding that the above-stated recital by Bernstein was credible evidence. At his own word, Bernstein is a long-time professional criminal. As we shall see in a moment, he is a former perjurer who perversely and flagrantly lied [fol. 4068] again to the jury on this present trial. By the doubtful testimony of a witness of such low moral fibre, uncertainty concerning the guilt of the defendants is produced to such an extent as to render substantial and reversible an error of law which, under other circumstances, might be regarded as harmless. (*People v. Pignataro*, 263 N. Y. 229. See *People v. Cashin*, 259 N. Y. 434.) From that point of view, we take up the exceptions of the defendants.

(2) In his testimony, Bernstein did not mention Buchalter. Two other witnesses for the People (Rubin and

the accomplice Berger) swore that Buchalter had ordered Weiss to bring about the death of Rosen. Rubin and Berger fixed the time when that order was given as well along in the afternoon of Friday, September 11, 1936, after Rubin (as he said) had reported to Buchalter, "that I went to Murray Weinstein to do something for me about Joe Rosen and that Murray Weinstein said he can't do anything." On the other hand, Bernstein swore it was earlier in the afternoon of that day when Strauss had requested him to steal the murder car. As to this surface inconsistency in the proof of the People, the trial judge in his charge said to the jury: "There is not a particle of evidence in the case as to when, if at all, Buchalter communicated in reference to the preparation work. The case is blank on that. There is no way of knowing. We do not know whether he did so, or, if he did, whether it was in the morning or the afternoon or the evening; but you have the testimony of Bernstein about when he received the alleged instructions to steal a car and hire a drop, which was earlier in the day. Taken in connection with the other facts, concerning the alleged preparation work, and putting this and that together, you have a right to draw such inference as you see fit."

After the jury had retired, the judge recalled them and further charged upon the same subject in this manner: "The case is blind as to whether or not Buchalter communicated. There is no way we know. You cannot presume that he did and you cannot presume that he did not, but I will say that the argument of one of the counsel for the defense in attacking the time tables as told by Bernstein as inconsistent with Rubin's testimony and Berger's testimony, is predicated upon an assumption on his part that there was no communication by Buchalter until after Rubin returned and gave word that Weinstein could not do anything. I charge you this—and I think this is accurate and will hold and will not be error—that there is no such presumption, and you are not justified in so presuming. If there is no such presumption, of course, then the argument attacking the time table fails."

Thus the last word of the judge withdrew from the jury a vital issue of fact and disposed of it in favor of the People as matter of law. This was obvious error. "What the evidence is—also what it proves—what credit a witness

is entitled to and all like things, are [in criminal cases] exclusively for the jury; and any charge is ill which takes this from them, or in any degree obstructs their free action thereon" (2 Bishop's New Criminal Procedure, [2d ed.], pp. 819-820.)

[fol. 4069] (3) For more than a year prior to this trial, Bernstein had been kept in custody at a hotel as one of a group described by him as members of "the mob." The main contention of the defense was that Bernstein's testimony against the defendants had been there fabricated by this group in an endeavor to shift the incidence of the death penalty for the killing of Rosen. This contention went to the heart of the People's case. (*People v. Becker*, 210 N. Y. 274, 308-309.) As an answer, Bernstein testified that during his confinement in the hotel he was under surveillance day and night by the police. Though that testimony was uncorroborated, the trial judge refused to let the jury pass upon its credibility. More than that, the judge certified to the trustworthiness of that testimony in this way: "You cannot lock criminals together when they are waiting their turn to be called to testify and let them put their heads together and maybe plot something behind the backs of the police. That would be sloppy police work, to permit discussion." The judge was without power so to invade the province of the jury.

(4) On cross-examination, Bernstein denied any letter had been written or sent by him while he was in custody at the hotel. Confronted then with three letters written in his own hand upon the hotel stationery, he owned he had lied. The quality of these documents is exhibited by the following excerpt: "Do you know how many guys are pinched just for conversation. Why do you make me write like this. I don't want to hurt you. Again I want t know did I do you any harm the way you are *defying* me. Well there is no *sence* of me trying to threaten you if you want it that away. So *Cherry* you are *making* me do this that I don't want all for \$200 dollars. I just want to remind you *years* don't mean anything to me." (The emphasis was first hand.)

The trial judge refused to receive these letters in evidence. Here again there is need to remember how the case for the People hangs on the credibility of Bernstein as a witness. Once more there is need also to keep in mind the

theory of the People that at the hotel Bernstein was never free to concert with others in respect of his role upon this trial. In both aspects, these letters were proximately relevant evidence on the side of the defendants. We think the text thereof should have been put before the jury. (See *People v. Becker*, 210 N. Y. 274, 298.)

(5) After Rosen had been killed but before the trial of the present case, Bernstein was a prosecution witness on a trial held at Monticello, Sullivan county. On that trial, he tried to swear away the life of one Gangy Cohen who was there accused of another murder. As regards his former testimony in the *Cohen* case, Bernstein was examined on the present trial as follows: "Q. Did you testify in the trial of Gangy Cohen to anything that was not true? A. Yes, sir, I knew I was doing wrong. Q. Did you fail to testify to some things that were true? A. Yes, sir, I knew I was doing wrong. * * * Q. Were you asked these questions and did you give these answers? A. My mind is very clear. Go ahead. * * * 'Question: And you had nothing [fol. 4070] to do with any murder on any occasion? Answer: That is right.' Q. Were you asked that question and did you give that answer? A. Yes, sir."

It was manifestly the duty of the trial judge to warn the jury specifically of the necessity of wariness on their part in consequence of this confession by Bernstein that where another life depended on his oath he had corruptly suppressed his participation in the murder here ascribed by him to two of these defendants. (Cf. *Dunn v. People*, 29 N. Y. 523.) The judge said: "The answer given to the question you have just read in the other trial could be viewed as being meant to be true if the witness considered it referred to the actual shooting. It would be untrue in relation to his being a principal under section 2 of the Penal Law, in the other work than killing." This animadversion was very much in the nature of a charge to the jury. (*People v. Wood*, 126 N. Y. 249, 269.) In our judgment, the exception taken thereto is valid.

(6) The sole support for Bernstein's accomplice-story against Capone was the People's witness Magoon. It was said by Magoon that Capone had made to him an oral utterance in these words: "I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." In the declared opinion of the trial judge, the statement so re-

ported by Magoon was "too indefinite" to be used as a confession of guilt on the part of Capone. At the same time, however, the judge directed the jury that Magoon's testimony (if credited) could be taken as corroborative evidence tending to connect Capone with the burden of Rosen. This was a controlling ruling. Belief in the actuality of Capone's oral admission as reported by Magoon was an indispensable condition of the finding of Capone's guilt. Hence the affirmance of these judgments of conviction must bespeak the conclusion of this court that the testimony of Magoon is not an altogether insufficient ground for the signing of the death warrant of Capone. (See *People v. Crum*, 272 N. Y. 348.) On this angle of the case we have felt—and still feel—no little concern.

A testimonial report of an oral admission of a party-litigant is generally the most dangerous evidence that can be received in a court of justice, and the most liable to abuse. (*Law v. Merrills*, 6 Wend. 268, 277.) Even when the admission is reported by a reputable witness, the testimony is often the weakest and most unsatisfactory of all the kinds of evidence. (See the authorities set forth in 7 Wigmore on Evidence, [3rd ed.] § 2094, p. 468.) Magoon was not a reputable witness. He is a self-confessed murderer. His appearance on the witness stand had no object but the saving of his own skin. There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone. For the purpose of this opinion only, we shall assume that the finding of Capone's guilt is not against the weight of the evidence; but we stress this phase of the record as a strong contradiction of any as-[fol. 4071] sertion of the conclusive quality of the proof for the People.

(7) On request of counsel for Capone, the trial judge said to the jury: "I will charge that unless they believe the testimony of Bernstein connecting Capone, that Capone must be acquitted." The gist of such connecting testimony was the ungarnished word of Bernstein that the getaway route over which he drove the murder car had been taught to him by Capone the day before the killing of Rosen.

During Bernstein's cross-examination on that critical issue, the trial judge made rulings as follows: "*Mr. Rosen-*

thal [Capone's counsel]: Q. You turned where on Pennsylvania Avenue, what turn left or right? A. Left. Q. How many blocks did you go then? A. One block, sir, to Dumont, made a right turn on Dumont. Q. And then you went straight down Dumont, didn't you? A. Yes, sir. Q. For six blocks? A. I don't know how many blocks. I went to Snediker Avenue, sir. Q. You knew Snediker Avenue—A. Yes, couldn't miss that because it was a one way street. Q. Will you please wait until I finish the question. You knew where Snediker Avenue lay from Pennsylvania, didn't you? *Mr. Turkus* [the trial prosecutor]: Objected to. Just answered it was a one way street * * * *Mr. Rosenthal*: Q. Did you know where Snediker Avenue lay from Pennsylvania Avenue, going down on Dumont Street? *Mr. Turkus*: Objected to as repetitious. *Mr. Rosenthal*: I have not asked it yet. *The Court*: Sustained. *Mr. Rosenthal*: Exception. * * * Q. Did you go slowly over the route? A. What do you mean slowly? I came from the store and the turns, that's where I had to watch myself, sir, them turns—the only thing I really had to know, sir, them turns. Q. As you were coming from the store, on this Saturday, did you slow up at each turn? A. Yes, sir. Louis Capone drove the car, sir. He drove my car all the time, sir. Q. Did he drive slowly over the route? *Mr. Turkus*: Objected to as repetitious. *The Court*: Sustained. *Mr. Rosenthal*: I respectfully except, sir. * * * Q. After you had come to a stop at Van Sinderen Avenue, was there any talk between you and Capone? A. While riding in the car, he told me, 'watch' * * * He says, 'This is the route you are going to take.' * * * Q. Is that all he said? A. Then he went over the route again and showed me, to make sure. Q. I first asked you is that all he said while you were at that point. Is that all he said? A. I didn't have a book and wrote down everything what he said to me, sir. Q. Is that all you remember he said? *Mr. Turkus*: Objected to as repetitious. *The Court*: Sustained. *Mr. Rosenthal*: Exception."

We think these exceptions are not without merit. *Mr. Wigmore* says: "Repeating precisely the *same allowable question on cross-examination*, in order by sheer moral force to compel a witness to admit the truth, *after an original false answer or refusal to answer*, is a process which not only savors of intimidation and browbeating, but also

tends to waste time. Nevertheless, when used sparingly [fol. 4072] and against a witness who in the cross-examiner's belief is falsifying, there ought to be no judicial interference Simple as the expedient seems, it rests on a sound psychology; and the annals of our trials demonstrate its power." (3 Wigmore on Evidence, [3d ed.] § 782, p. 146. See, also, 1 Chamberlayne, *The Modern Law of Evidence*, § 553.)

The cogency of this view was here proved again when the testimony of Bernstein before the grand jury came to light. He had there sworn it was he—Bernstein—who drove the car in which he learned the getaway route. Faced with that self-contradiction, Bernstein said: "That is a mistake, sir. I made the mistake, sir." This was not the only particular in which Bernstein's evidence before the grand jury was at variance with his recital on this trial of the part played by Capone in the murder of Rosen. The case against Capone, we repeat, had no foundation other than the testimony of Bernstein to which the foregoing cross-examination was directed. No one can be sure the verdict against Capone was not the result of an undue restriction of his essential right so to test the credibility of that testimony.

(8) Early in his summation, the Assistant District Attorney posed these queries to the jury: "To begin with did anybody here tell you that Sholem Bernstein did not steal the murder car? Did anybody do that? Did anybody show you that he did not steal the plates? Did anybody say to you that he did not chauffeur the murder car when Rosen was killed?" Since none of the defendants was a witness, the whole point of that argumentation was its erroneous accent upon the assertion by them of their constitutional privilege against compulsory self-incrimination. In our judgment the exception taken thereto is valid. (See *People v. Watson*, 216 N. Y. 565.)

As the opinion of the chief judge shows, the trial prosecutor in his summation gave to the jury an unfounded pledge as to the future of the accomplice witnesses. This pledge was buttressed by the trial prosecutor in these words: "Whatever my lot in life may be, whether I go out of office or stay in, whatever the future holds for me, I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy,

would ever be used in any way with any of you to make you feel that I had discredited you or myself or any member of the public. And that is just for me alone. And one more thought—if I could spend the rest of my life fighting this type of situation, I would like it. And that ends it." When objection was made to this plea, the trial judge said: "We will have no further interruption." A majority of this court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument may have unduly prejudiced the jury against the defendants. (See *People v. Mull*, 167 N. Y. 247; *State v. Clark*, 114 Minn. 342.)

(9) Numerous exceptions to the charge of the trial judge are pressed upon us. For instance: the cross-examination of the People's witnesses concerning prior contradictory [fol. 4073] statements made by them was not ineffective, as we have seen. In that connection, the trial judge said to the jury: "Well, of course, if a man is asked whether he made an admission a long time ago, he may remember that, but to put a burden upon him of remembering the exact text of question and answer is an unholy thing."

Again: The trial judge said this to the jury: "There is nothing disreputable in a prosecuting attorney putting on the stand a witness who turns State's evidence. It is a proper method of prosecution and enforcement of the law. When rogues fall out it is a wise man's delight." Although the jury were brought back from their deliberations and advised to disregard the epigram last quoted from the charge, we are still left with the vexed question whether the belated admonition of the court sufficed to remove the obvious intimation which was conveyed to the jury by so pithy a dictum from the bench. (Cf. *People v. Robinson*, 273 N. Y. 438.) But we pass the exceptions to these matters, because in any event the charge as a whole fell below the requisite standard.

The trial judge at least was bound generally to analyze the evidence in the case so as to present to the jury fairly the conflicting claims of the People and the defendants. (*People v. Montesanto*, 236 N. Y. 396.) He expressly disavowed that duty. In defining the scope of his instructions to the jury, he said therein: "This is purely a segregation to guide you against misapplication of the evidence as against defendants to whom it does not apply. It is not a discussion of evidentiary values; it is not an expression of

belief by the Court as to whether you shall accept such testimony as true. For that reason there is no review of cross-examination or of any of the evidence on the several defendants' side of the case."

In keeping with that announced purpose, the charge made no reference whatever to any one of the above-stated impeaching facts that were brought out during the cross-examination of witnesses for the People. That aspect of the case was dismissed by the judge in this fashion: "cross-examination is almost impossible to correctly state in such a manner that two people will agree on its fairness because, while direct examination goes right to the point, cross-examination, being for the purpose of breaking down the direct, it is largely hit or miss; it is blank cartridge shooting. Once in a while you find that a bullet had hit, but whether there is a hit or not may be a matter of dispute. Unless there be an outstanding point come out on cross-examination, the Court would only tend to confuse and mislead the jury if it attempted to discuss it."

As an inevitable consequence of these conceptions of his function, the judge's treatment of the proofs took on the character of a summation for the People. We will not say such a charge was right. (See *People v. Becker*, 210 N. Y. 274, 307.)

(10) Nor do we think the one-sidedness thereof was corrected when counsel for the defendants requested further instructions in respect of specific items of the self-impeachment of witnesses for the People. In response thereto, the judge in some instances made this oblique remark to the [fol. 4074] jury: "You may consider that for what, if anything, it is worth." In other instances, the request brought forth a commentary which aided the People by toning down the contradictory statements of their witnesses. For example—

The main proof against Buchalter came from the witness Rubin whose testimony makes up a large part of "the facts" which Judge Coxway has marshalled in his opinion. On cross-examination, Rubin he was confronted with a statement made by him in December, 1937, to Mr. McCarthy (then an assistant district attorney) covering this *Rosen* case. Conceding the verbal correctness thereof, Rubin acknowledged that this statement "did not implicate the defendant Buchalter, or Lepke, in any respect whatever."

When counsel for Buchalter requested that the jury be directed to take notice of Rubin's contradictory statement to Mr. McCarthy, the trial judge said: "On the second point of that request, he [Rubin] did not testify before McCarthy at all. He was not under oath. That is not perjury. That is a contradiction and he has explained it. He says he had been shot through the head because of testifying before the Dewey grand jury, and he was afraid to give McCarthy any information about the *Rosen* case. I charge the jury that they can consider the explanation in connection with the apparent evasion on that point before Mr. McCarthy. If it was on the basis of fear, they can consider the extent, if any, to which it ameliorates the contradiction and whether or not the contradiction, admittedly so before McCarthy, really amounts to anything at all. He was under no obligation to give any evidence; it was not sworn to before any official, so far as legal procedure is concerned; it was not compulsory." This argument in support of Rubin's credibility was inadmissible. Evidence of a prior self-contradiction by a witness, "is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief." (SHAW, C. J., in *Commonwealth v. Starkweather*, 10 Cush. [Mass.] 59, 60.) Hence the fact that Rubin had not sworn to his contradictory statement to Mr. McCarthy was immaterial. (3 Wigmore on Evidence, [3rd ed.] § 1044, p. 727)

(11) Rubin's testimony was offered to show the alleged motive for this crime,—fear lest Rosen vent a business grievance by instigating a criminal prosecution of Buchalter. To the same end, members of the family of Rosen endeavored by their testimony to show his prominence in the commercial field in which Buchalter was active in labor affairs; but the trial judge struck out that testimony as being "too sketchy to have any value as evidence." As a result there was no contradiction of witnesses for Buchalter who testified to the indifference of Rosen's success as a man of business. In that state of the case, Buchalter at least was entitled to have the jury consider whether he was right in his claim of the absence of any compelling reason [fol. 4075] why he should have been greatly afraid of the

enmity of so inconspicuous a person as Rosen. (*People v. Becker*, 215 N. Y. 126, 135.)

On this issue, the trial judge in his charge said to the jury: "So far as the People's case is concerned, the furthest you can go in figuring out motive on Buchalter's part for wanting Rosen out of the way is that because of a business grudge carried by Rosen against Buchalter, having to do in some manner with the trucking company affairs in relation to the Pennsylvania business, and apparently blaming Buchalter for it, Buchalter feared that Rosen would reprise by giving information to Mr. Dewey which would get him, Buchalter, in trouble with the authorities." But the next phrase of the judge was this: "That is enough as motive evidence, if you find these facts to be established to your satisfaction, reasonably." The judge was without power so to deal with the effect of evidence as proving the case against Buchalter. At this point again, there should have been a presentation of both sides of the issue,—and the question of the weight of the evidence also should have been submitted to the jury.

In the preceding subdivision 2 of this opinion, we indicated another important issue of fact which was even more strongly ruled against Buchalter by the trial judge. On the whole, we find ourselves unable to perceive how the basic finding of Buchalter's distant connection with the actual shooting of Rosen can be taken to have been made by the jury alone.

(12) For a final word: We believe the foregoing combination of errors cannot rightly be looked upon as a technical defect. Of course this crime was an atrocious thing and the defendants apparently were men of past bad moral disposition. But these considerations are nothing to our purpose: it is for us to keep to the question whether the trial was fair. This last, as has so often been said, is the great requirement of this court's own function in all capital cases,—even when, as in this instance, the evil life of an accused may be an influence to warp the less responsible judgment of others. (*People v. Marwig*, 227 N. Y. 382, 389.)

Through many generations, common law practice in criminal cases has been governed by certain fundamental rules, namely: "The jury is the final arbiter of every question of fact." (*People v. Pignataro*, 263 N. Y. 229, 240.) "The

court's charge is of supreme importance to the accused. It should be the safeguard of fairness and impartiality and the guarantee of judicial indifference to individuals." (*People v. Odell*, 230 N. Y. 481, 487.) On the present trial this historic practice was virtually declared away. We do not see how the conviction of the defendants can be affirmed, without annulling the statute which makes the jury in a criminal case the exclusive judges of questions of fact. Nor do we see how an affirmance is possible without deciding that in a criminal case the trial judge in his charge may entirely ignore the evidence and the contentions of the accused unless in the end some request is made for a different handling of the issues.

Since there is abundant reason for doubt of the guilt of any of the defendants, we cannot assume that no doubt thereof existed in the jury room. A long sequence of faulty rulings had materially strengthened the case for the People. With the sanction of the court, the People's representative had urged his personal integrity as a factor against the defendants. It is not for us to say that such substantial errors had no influence on the jury, for this is beyond our finding out. (See *Stokes v. People*, 53 N. Y. 164, 184; *People v. Bonier*, 179 N. Y. 315.)

[fol. 4076] We believe the judgments of conviction should be reversed so that the defendants may have a fair chance to defend their lives before another jury.

RIPLEY, J. (dissenting). I agree with all that Judge LOUGHRAN has said concerning the errors committed during the progress of the trial, that such errors were prejudicial and cannot be overlooked. Reference might have been made to other errors. Among those was the charge substantially to the effect that the burden rested upon Weiss to establish his innocence on the basis of his alibi defense. (*People v. Vaccaro*, 288 N. Y. 170.) I also agree with Judge LOUGHRAN that the trial was unfair. In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable doubt. It does not follow that a new trial should be ordered. There was insufficient legal

evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed. In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt.

The judgments of conviction should be reversed as to all of the defendants and the indictments dismissed.

FINCH and LEWIS, JJ., concur with CONWAY, J., LEHMAN, Ch. J., concurs in result in separate opinion; LOUGHRAN, J., dissents in opinion in which DESMOND, J., concurs; RIPLEY, J., dissents in separate opinion.

Judgments of conviction affirmed.

[fol. 4077]

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding;
John Ludden, Clerk

REMITTITUR—October 30, 1942

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
ag'st

LOUIS BUCHALTER, Alias "LEPKE", Appellant

Be It Remembered, That on the 16th day of May, in the year of our Lord one thousand nine hundred and forty-two, Louis Buchalter, alias "Lepke," the appellant in this action, came here unto the Court of Appeals, by Wegman & Climenko and Hyman Barshay, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court of the County of Kings, And The People of the State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William O'Dwyer, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard [fol. 4078] this cause argued by Mr. I. Maurice Wormser of counsel for the appellant, and by Mr. Solomon A. Klein of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings appealed from in this action, be and is hereby in all things Affirmed.

Appellant, in his brief and argument, raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, October 30, 1942.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal.)

[fol. 4079]

IN COURT OF APPEALS

STATE OF NEW YORK:

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the thirtieth day of October A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, Presiding

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against

LOUIS BUCHALTER, Alias "LEPKE", Appellant

The defendant herein, Louis Buchalter, alias "Lepke" having been heretofore and on the thirtieth day of November, 1941, convicted of the crime of Murder in the first degree at a trial had at a Term of the County Court, held in and for the County of Kings and on the second day of December, 1941, sentence of death having been duly passed and imposed upon the said defendant by such Court, and the defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect;

Now, Therefore, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that the week beginning Monday, the seventh day of December, in the year of our Lord one thousand nine hundred and forty-two be and the same hereby is fixed as the week during which [fol. 4080] the original sentence of death shall be executed upon the defendant herein.

In Witness Whereof, the Honorable Irving Lehman, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to be affixed

hereunto, this thirtieth day of October in the year of our Lord one thousand nine hundred and forty-two.

Irving Lehman, Chief Judge. John T. Loughran,
Edward R. Finch, Harlan W. Rippey, Edmund H.
Lewis, Albert Conway, Charles S. Desmond, Associate Judges. (Seal.)

Attest: John Ludden, Clerk of the Court of Appeals.

[fol. 4081]

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding;
John Ludden, Clerk

REMITTITUR—October 30, 1942

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

ag'st

EMANUEL WEISS, Alias "MENDY WEISS", Appellant

Be It Remembered, That on the 16th day of May, in the year of our Lord one thousand nine hundred and forty-two, Emanuel Weiss, alias "Mendy Weiss," the appellant in this action, came here unto the Court of Appeals, by Alfred J. Talley, James I. Cuff and M. M. Kreindler, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court [fol. 4082] of the County of Kings, And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William O'Dwyer, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Alfred J. Talley of counsel for the

appellant, and by Mr. Solomon A. Klein of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings, appealed from in this action, be and is hereby in all things Affirmed.

Appellant, in his brief and argument raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 4083] COURT OF APPEALS, CLERK'S OFFICE,
Albany, October 30, 1942:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal.)

[fol. 4084] STATE OF NEW YORK :

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the thirtieth day of October, A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, Presiding.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against

EMANUEL WEISS, alias "MENDY WEISS" Appellant

The defendant herein, Emanuel Weiss, having been heretofore and on the thirtieth day of November, 1941, convicted of the crime of Murder in the first degree at a trial had at a Term of the County Court, held in and for the County of Kings and on the second day of December, 1941, sentence of death having been duly passed and imposed upon the said defendant by such Court, and defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect ;

Now, Therefore, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that the week beginning Monday, the seventh day of December, in the year of our Lord one thousand nine hundred and forty-two be and the same hereby is fixed as the week during which the original sentence of death shall be executed upon the defendant herein.

[fol. 4085] In Witness Whereof, the Honorable Irving Lehman, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to

be affixed hereunto, this thirtieth day of October in the year of our Lord one thousand nine hundred and forty-two.

Irving Lehman, Chief Judge; John T. Loughran, Edward R. Finch, Harlan W. Rippey, Edmund H. Lewis, Albert Conway, Charles S. Desmond, Associate Judges. (Seal.)

Attest: John Ludden, Clerk of the Court of Appeals.

[fol. 4086]

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of October in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur October 30, 1942.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
ag't.

LOUIS CAPONE, Appellant

Be It Remembered, That on the 16th day of May, in the year of our Lord one thousand nine hundred and forty-two, Louis Capone, the appellant in this action, came here unto the Court of Appeals, by Leon Fischbein, Emanuel Rosenberg and Sydney Rosenthal, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court of the County of Kings, And The People of the State of New York, the respondent in said action, afterward appeared in said Court of Appeals by William O'Dwyer, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 4087] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Sydney Rosenthal of counsel for the appellant, and by Mr. Solomon A. Klein of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court of the County of Kings ap-

pealed from in this action, be and is hereby in all things Affirmed.

Appellant, in his brief and argument raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of the County of Kings, before the Judges thereof, according to the form of the statute in such case made and provided.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, October 30, 1942.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal.)

[fol. 4088] STATE OF NEW YORK:

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the thirtieth day of October, A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, presiding.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
against

LOUIS CAPONE, Appellant

The defendant herein, Louis Capone, having been heretofore and on the thirtieth day of November, 1941, convicted

of the crime of Murder in the first degree at a trial had at a Term of the County Court, held in and for the County of Kings and on the second day of December, 1941, sentence of death having been duly passed and imposed upon the said defendant by such Court, and the defendant having subsequently appealed to the Court of Appeals, and the time fixed by the Court for the execution of said sentence having passed by reason of the pendency of said appeal, and upon said appeal the judgment of death having been affirmed by this Court, and said affirmance having directed that the original judgment stand in full force, strength and effect:

Now, Therefore, in pursuance of the Statute in such case made and provided, it is ordered and adjudged that the week beginning Monday, the seventh day of December, in the year of our Lord one thousand nine hundred and forty-two be and the same hereby is fixed as the week during which the original sentence of death shall be executed upon the defendant herein.

[fol. 4089] In Witness Whereof, the Honorable Irving Lehman, Chief Judge of the said Court of Appeals, and the undersigned Associate Judges of the said Court, constituting a majority of the Judges thereof, have subscribed their names and caused the seal of the said Court of Appeals to be affixed hereunto, this thirtieth day of October in the year of our Lord one thousand nine hundred and forty-two.

Irving Lehman, Chief Judge; John T. Loughran, Edward R. Finch, Harlan W. Rippey, Edmund H. Lewis, Albert Conway, Charles S. Desmond, Associate Judges. (Seal.)

Attest: John Ludden, Clerk of the Court of Appeals.

[fol. 4090] STATE OF NEW YORK:

COURT OF APPEALS

Clerk's Office

I, John Ludden, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copies of the Notice of Motion for reargument dated November 12th, 1942 and returnable November 23rd,

1942 and the brief in support thereof with admission of service thereon by the District Attorney of Kings County dated November 12, 1942 in The People of the State of New York, Plaintiffs-Respondents, against Louis Buchalter et al., Defendants-Appellants with the original on file in this office, and that the same are correct transcript therefrom, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this eighteenth day of December, 1942, A. D.

John Ludden, Clerk, by Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4091] COURT OF APPEALS, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs-Respondents,

against

LOUIS BUCHALTER, et al., Defendants-Appellants

NOTICE OF MOTION AND BRIEF FOR RE-ARGUMENT

Wegman & Climenko, Attorneys for Defendant-Appellant, Louis Buchalter, 60 Wall Street, Borough of Manhattan, New York City, N. Y. I. Maurice Wormser, J. Bertram Wegman, Jesse Climenko, of Counsel.

Due and timely service of a copy of the within Notice of Motion and Brief for Re-argument is hereby admitted, this 12th day of November, 1942.

Sol Klein, Acting District Attorney of Kings County, By E. McNamara, Clerk.

[fol. 4092] NOTICE OF MOTION FOR RE-ARGUMENT

COURT OF APPEALS, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs-
Respondents,

against

LOUIS BUCHALTER, et al., Defendants-Appellants

SIR:

Please take notice that upon the record and briefs herein, filed and submitted to the Court upon the argument of the appeal, upon the notice of motion herewith, and upon the decision and opinions of the Court dated the 30th day of October, 1942, affirming the conviction of defendant Buchalter, and upon the brief hereto annexed, a motion will be made in the Court of Appeals at its Court House, in the City of Albany, on the 23rd day of November, 1942, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard, for a re-argument of said appeal upon the following grounds:

1. The Court misapprehended the facts and the law concerning the errors assigned by appellants to the rulings below denying the motions for a change of venue and the motions for an adjournment of the time of the trial.

[fol. 4093] 2. The Court misapprehended the facts and the law concerning the errors assigned to the rulings of the trial Court upon the challenges to prospective jurors and to jurors impaneled, and the remarks of the trial Court during and in the course of the impaneling of the jury; and particularly that the Court misapprehended the law in holding that the rulings of the trial Court upon the challenges to prospective jurors and to jurors impaneled were not subject to review in a capital case by the Court of Appeals.

3. The Court misapprehended the facts and the law concerning the errors assigned, or overlooked the errors assigned, to the refusal of the trial Court to make available to the defendants and to permit the use by them of certain official records of the Police Department of the City of New York.

4. The Court misapprehended the facts and the law concerning the errors assigned to the rulings and comments of the trial Court upon and during the cross-examination of the People's witnesses Rubin and Berger.

5. The Court misapprehended the facts and the law concerning the errors assigned to the rulings, comments, charge and conduct of the trial Court, as more specifically set forth in the brief attached hereto.

6. The Court misapprehended the facts and the law concerning the errors assigned to the refusal of the trial Court to rebuke and repress improper and prejudicial statements by the prosecutor in his summation to the jury whereby the jury was misled.

[fol. 4094] 7. The Court misapprehended the facts and the law concerning the errors assigned to the conduct and the course of the proceedings in the trial Court, which resulted in a denial and a disregard of the rights of the defendants to a fair and impartial trial and to due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

And upon such other and further grounds as are set forth in the attached brief.

And for such other and further relief as may seem just and proper.

Dated, New York, November 12th, 1942.

Yours, etc., Wegman & Climenko, Attorneys for Appellant Buchalter, 60 Wall Street, Borough of Manhattan, City of New York.

I. Maurice Wormser, Counsel for Appellant Buchalter.

To: Hon. Thomas Craddock Hughes, Acting District Attorney, Kings County, Municipal Building, Brooklyn, N. Y.

[fol. 4095] COURT OF APPEALS, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
Respondents,

against

LOUIS BUCHALTER, et al., Defendants-Appellants

Brief for Appellant Buchalter in Support of Motion for
Re-Argument

STATEMENT

This is a motion by appellant, Louis Buchalter, for a re-argument of the appeal from the judgment of the County Court of Kings County, dated December 2, 1941, convicting appellant of the crime of Murder in the First Degree.

On the 30th day of October, 1942, this Court handed down its decision of the said appeal, affirming the judgment of conviction.

This motion is made upon the ground that this Court overlooked and misapprehended certain material and important facts and principles of law decisive of the case.

The procedure adopted herein follows the precise precedent of the motion for re-argument by the District Attorney of Kings County in *Peo. v. Nitzberg*, which motion was entertained by this Court and decided January 15, 1942 (287 N. Y. 754).

[fol. 4096]

Point I

This Court misapprehended the rule regarding a review of the denial of a motion for change of venue, overlooked the facts thereon, and disregarded the error in denying the application for adjournment of the trial.

Forcing the defendant to trial at a place where and a time when a fair trial was impossible, violated due process of law.

The only reference in the opinions of the Judges who voted for affirmance of the judgment of conviction, concerning appellant's argument that it was error to deny the motions for a change of venue, is to be found in the opinion of Judge Conway concurred in by Judges Lewis and Finch. It was said there was no merit in appellant's argument because (1) the trial was by a "special jury"

and (2) the motion was addressed to the discretion of the Court below, and the Judges of this Court were not prepared to say that the denial was an abuse of discretion.

With all due respect, it is submitted that this Court thereby misapprehended the true situation. That there was a "special jury" ordered for this trial is no answer to the argument that no jury, special or otherwise, could be obtained in the County of Kings, uninfluenced by the widespread local prejudicial publicity, newspaper articles (some of them obviously inspired) charging the defendant with guilt of this and countless other crimes, and assuming that his conviction in this case was a foregone conclusion, and the striking coincidence of the local election campaign in which both the trial judge and the District Attorney were party candidates. While ordinarily it is true that subsequent events may not be used as an argument in support of an earlier application, here it is clear from the subsequent events that the application was well founded. Even this special panel of jurors, supposedly above the average in intelligence, was found to have been influenced to such an extent by the newspaper publicity that five weeks were consumed in an effort to obtain a jury, and even then an impartial jury was not impaneled. And even the trial judge said that the newspaper articles played havoc with the talesmen.

The error became the more glaring when, over the objection and exceptions of the defendants, the trial court insisted upon the trial proceeding at a time when both the trial judge and the District Attorney were candidates for public office, and in the very midst of their campaign for such offices. Of the fact that it was a heated campaign this Court may take judicial notice. Of these facts no mention is made in the prevailing opinions, and they appear to have been overlooked.

In a capital case such as this, the review by this Court is not restricted to a mere determination of whether there was an abuse of discretion. By direction of the New York State Constitution, in a capital case this Court is required to consider the facts as well as the law and to determine whether justice was done. By the requirements of the Fourteenth Amendment of the Constitution of the United States, this Court is enjoined to ascertain whether "due process of law" was observed. Surely the fundamental law demands at least this much (cases cited *post*).

It is of the essence of "due process of law" that defendants be accorded a fair and impartial trial by fair and impartial jurors free of influences extraneous to the evidence adduced. It is the duty of this Court to inquire not merely whether "due process of law" was denied in express terms, but also whether it was denied in substance and effect. *Norris v. Alabama*, 294 U. S. 587; *Whitney v. California*, 274 U. S. 357.

It is not enough therefore for this Court to say that the motions for a change of venue were addressed to the discretion of the court below. It is the bounden and definite duty of this Court to say whether, upon the facts presented, the motion should have been granted.

Here there were submitted as exhibits a series of violent, sensational newspaper articles, limited in circulation to the County of Kings, denunciatory of this appellant, widely distributed throughout that County at a time immediately before, and up to, and even after, the commencement of the trial,—the vicious effect of which was fully demonstrated in the course of examination on *voir dire* of prospective jurors.

It was a grave and substantial error to require the trial to proceed in the County of Kings at that time under those circumstances as well as a denial of "due process of law".

Point II

This Court erroneously refused to consider the rulings of the trial court upon challenges to the jurors, which should have been reviewed. Due process of law was denied both by the rulings of the trial court and by such refusal to review them.

The majority of this Court cast aside the argument of appellant that a fair and impartial jury was not impaneled [fol. 4099] and that there was error in the overruling by the trial court of challenges to prospective jurors, with the statement in the opinion of Judge Conway, that, by statute, such rulings of the trial court were final, and that such statute, in so providing, had been pronounced constitutional, citing *Peo. v. Dunn*, 157 N. Y. 528. The majority of this Court (with great deference and respect) misapprehended the law on this subject. In a *capital* case at least, that provision of the statute is not constitutional, nor is

it consistent with "due process of law". The majority of this Court overlooked the fact that the reason given for the decision in *Peo. v. Dunn* (*supra*), was that there is no constitutional guaranty of the right of appeal, and that such right may be abrogated or modified by the legislature. But, in capital cases, the legislature may not interfere with the right of appeal. In a capital case that right is fully guaranteed, both as to the law and as to the facts, by the provisions of the Constitution of the State of New York, Article VI, Section 7 (*People v. Crum*, 272 N. Y. 348).

Thus this Court should have examined and passed upon the rulings of the trial court upon the challenges.

Furthermore "due process of law" encompasses the impaneling of a fair and impartial jury, and it is the duty of this Court to inquire whether the jury here impaneled was in fact fair and impartial, and whether the substantial and constitutional rights of the defendant were observed in that impaneling. If, as is the fact here, challenges for cause were improperly and erroneously overruled, whereby the defendants' peremptory challenges were exhausted before a jury was selected, so that the defendants were [fol. 4100] denied the right of peremptory challenge to jurors impaneled, "due process of law" has not been observed.

Since the jury that was chosen was obtained as a result of erroneous rulings by the trial court, and since at least as to two of the jurors sworn, positive doubt existed as to their impartiality and lack of bias, "the doom of mere sterility was on the trial from the beginning" (CARDOZO, J., In *Clark v. U. S.*, 289 U. S. 1, 11).

The castigation by the trial judge of prospective jurors who expressed doubt that their impressions adverse to the defendants could be laid aside, necessarily resulted in a reluctance by others to reveal such mental bias because of their justified fear of the consequential denunciation by the trial judge. The remarks of the trial judge during the impaneling of the jury must necessarily have tended to suppress a free expression on the part of the talesmen being examined. Hence, this Court can never be sure that any of the talesmen approached his duty with a free, open and unbiased mind, and in the case of at least two of the jurors that doubt affirmatively appears.

Point III

This Court misapprehended and overlooked the fact that this jury was improperly influenced and misled throughout the proceedings below, and the verdict undoubtedly was influenced thereby. This misleading of the jury *per se* requires reversal.

The learned Chief Judge, in his opinion, frankly expresses his own reasonable doubt of guilt, but because he states that he believes the jury had the right to reach the conclusion that it did, he has voted to affirm.

[fol. 4101] It is respectfully submitted that the Chief Judge has misapprehended the fact that the jury was *misled* and *unduly influenced* from the *very inception* of the trial,—and, indeed, were predisposed to convict by impressions derived *dehors* the record even *before* they were sworn (Point I, *ante*).

These were supposedly intelligent jurors, a “special panel”, chosen for their greater capacity of understanding and appreciation. They were presumably qualified to examine, appraise and evaluate evidence under proper instructions, and doubtless would have been burdened with the *very same doubts* which have assailed the mind of the learned Chief Judge, had this trial been fair and had they been properly instructed, and had they approached the evaluation of evidence with free minds. The difference is that the Chief Judge has applied his mind to the evidence *untrammelled by the poisonous atmosphere engendered in the trial court*, and divorced from the influence of the regrettable rulings of the trial judge and the regrettable and unprofessional excesses of the prosecuting attorney, which, in at least one instance, overstepped the boundary line of truth.

Our point is that the jury would have had the same doubt as remains with the learned Chief Judge after considering the record, if those other extraneous elements had not intervened prejudicially to prevent calm and dispassionate consideration and deliberation.

Considering, then, that these jurors were not “trained to decide questions of fact solely upon competent and relevant evidence” and that, as all know, a jury generally tends to accept unquestionably the expressed opinions of the judge who presides, how can it be said that the appraisal of the

[fol. 4102] evidence by the jury was not affected by the numerous incidents, remarks and rulings at the trial which should never have intervened! The Chief Judge regrets these, *but the jury was misled by them!*

A review of some of these is submitted to emphasize the argument, and because such a review will demonstrate the invidious influences which indubitably led the jury to a verdict of guilt where reasonable doubt in fact existed.

(1) The "time table".

It is said in the opinion of Judge Conway that the statements of Bernstein were reconcilable with the statements of Rubin and Berger. But if reconcilable at all, it is only by pure speculation; there is *no* such evidence. In a capital case the jury has no right to speculate. Here they were not only invited to speculate, they were instructed by the trial judge that the defendant's argument was unworthy of any consideration whatever. They were not permitted to exercise their intelligence in appraising the testimony and whether or not the statement could be reconciled; the simple fact is that they were instructed in such a manner as to require them to assume that the seeming contradictions were *no* contradictions at all, were not inconsistencies and were entitled to no consideration in their deliberations. Thus, there was effectively ruled out from their consideration a matter which, in and of itself, may have caused them to have a reasonable doubt of the verity of the testimony.

(2) Rubin's prior inconsistent statement.

It was demonstrated that the witness Rubin had stated, upon an earlier examination, that the defendant Buchalter [fol. 4103] had nothing to do with the murder of Rosen. Here the trial court not only failed to permit the jury to consider that statement as affecting the credibility of Rubin,—substantial error though that is,—his error was much more grievous. He assumed, and he impressed upon the jury, that this earlier statement of Rubin's was untrue. The vice here is not merely that the jury should have been permitted to consider whether Rubin's prior statement was untrue but excusable because engendered by a putative fear, not merely that the trial court palliated the assumed falsity by suggesting "*Les Miserables*" as a parallel—but, much more, the jury should have been instructed that they

were entitled to credit that prior statement as a truthful statement, and if they believed it to have been true, then Buchalter was entitled to an acquittal.

Can it be reasonably said that this grievous error did not influence the verdict? The whole case of the People against Buchalter depended upon the testimony of Rubin. Was not the jury misled, and their verdict thereby influenced, by the shrewdly calculated attitude and instructions of the trial court that this prior exculpatory statement was not alone untrue but a venial untruth? Had the jury been told that they had a right, if they so wished, to credit this prior inconsistent statement of Rubin as the truth, the jury thereby would have been given the right to disregard Rubin's testimony implicating Buchalter in the murder. It should not have been submitted merely as a matter bearing upon Rubin's credibility,—and yet it was not even submitted in that limited form; it should have been submitted to the jury, as a question for their decision, whether Rubin in fact told the truth to Mr. Hogan and to Assistant District Attorney McCarthy, so that (in that event) his whole testimony implicating Buchalter on this trial was false and unworthy of credence. Cf. *Hull v. Littauer*, 162 N. Y. 569. Even here, this Court apparently assumed (quite erroneously) that this prior statement was untrue, and considered only whether the jury was properly instructed concerning the effect of its untruth upon Rubin's testimony in the case at bar.

(3) Rubin's flight.

In appraising the truth of Rubin's testimony concerning the participation by Buchalter in the Rosen murder, the jury was permitted to consider the fact that Rubin had, at Buchalter's alleged instance, fled the jurisdiction. If the jury entertained a reasonable doubt that Rubin's flight was engendered by fear of the investigation of the Rosen murder, they should not have considered that flight as an element bearing upon guilt. Since the fact of Rubin's flight was undisputed, the jury was misled in its consideration of the probative force of that flight by the instruction that Rubin's testimony as to flight was binding on the defendant unless the jury affirmatively found that fear of the Rosen case was not the motive. Thus, in effect, the jury was erroneously instructed that Buchalter bore the burden of disproving the connection between that flight and the Rosen case, whereas

the true rule is that that flight should not have been considered against Buchalter if the jury reasonably doubted the connection.

(4) Bernstein and Tannenbaum.

The jury was in effect instructed by the court to assume that the People's witnesses had not conferred in advance of [fol. 4105] the trial. This was a matter which should have been left to the jury, particularly in the light of the cross-examination of Bernstein. Had the jury been permitted to consider whether or not this story had been concocted by the People's witnesses in conference, they might have been unwilling to place credence in it. But they were told by the court that there were no such conferences among the witnesses and were misled to believe that the testimony was not the result of collaborative effort. The vice of this instruction is obvious.

(5) The summation of the prosecutor.

Whether the testimony of the debased characters which made up the People's case,—so polluted a source that the evidence therefrom failed to remove from the mind of the Chief Judge a reasonable doubt of the defendant's guilt,—was induced by hope of reward or indulgence from the District Attorney was a proper matter for the consideration of the jury. Yet the jury was falsely misled to believe that there was *no* such inducement for the testimony, and the trial court apparently sanctioned that deception. The Chief Judge, in his opinion, has frankly deplored the statement of the prosecuting attorney ("which the prosecuting attorney could not properly or truthfully make") putting in issue his own integrity. It was improper for him so to make the promise even if true; *it was the gravest wrong for him to dissemble*. And time has demonstrated how false was the assertion that these witnesses were uninspired by hope, and how false the promise that, in due time, they would receive their just desserts, for each of them,—Bernstein, Tannenbaum and Berger,—has been given his freedom, wholly unpunished for his confessed crimes. There is only one way to justly characterize such testimonial transactions: [fol. 4106] bought and paid for: (Cf. *Peo. v. Nitzberg*, 287 N. Y. 183). Is it conceivable that the jury would have en-

tertained no doubt of their veracity had that expectation of "consideration" not been denied? A jury has, and is entitled to have, full confidence in the honesty and good faith of the prosecuting attorney. The jury was bound to be influenced by his glib assurances. "In these circumstances (says the highest court of our country) prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger v. U. S.*, 295 U. S. 78.

(6) The omission of the trial judge to review the cross-examination.

With facile plausibility, the trial judge sought to excuse his review of all of the supposedly incriminating evidence, without any reference to what was developed on cross-examination, by ascribing to himself a purpose merely to "segregate" the testimony (*sic*) so that it might not be misapplied by the jury. The majority of this Court has held that this either was no error or that it was not error which misled the jury. Perhaps that might be so, if all that had been done was to omit reference to the cross-examination. But this Court has misapprehended or overlooked the fact that there was far more than a mere omission to refer to the cross-examination. There was a deliberate and illegal belittling of that cross-examination; it was nonchalantly waved aside as of neither moment, nor consequence, nor effect. Inevitably this cavalier treatment of the cross-examination must have misled the jury into attaching little, if any, weight to what was developed thereon. This was the grave vice of the Court's device. The cross-examination [fol. 4197] was not merely omitted from his discussion,—it was deprecated and depreciated. Thus did he invade the province of the jury and thus did he mislead it. Neither fair, nor square, nor "due process of law".

Point IV

The learned Chief Judge, whose vote was decisive of the appeal herein, overlooked the rule that his own reasonable doubt of guilt necessarily required a reversal of the conviction.

The learned Chief Judge, in his opinion, concurring in the affirmance, with characteristic fairness, has unmistak-

ably expressed his own reasonable doubt of guilt. With the utmost deference, it is respectfully suggested that the Chief Judge inadvertently has misapprehended the law governing consideration of an appeal in a *capital* case, in limiting his review to the question of whether the jury heard enough evidence (even though truly it was unworthy of credence) to justify a verdict of guilt. *Where the evidence leaves a reasonable doubt in the mind of this Court, the rule is that the conviction in a capital case should be reversed and a new trial granted.* *Peo. v. Crum*, 272 N. Y. 348, 350.

This Court must find the evidence of such weight and *credibility* as to convince the court, before it may be said that the jury was justified in finding a verdict of guilty.

If that is the law, as it was said by this Court to be in *Peo. v. Crum*, the persisting reasonable doubt, which the People's evidence from such polluted sources has failed to remove from the mind of the Chief Judge, requires a reversal here.

[fol. 4108]

Point V

This Court overlooked the error in the refusal of the trial court to accord defendant access to the official records of the Police Department of the City of New York.

Ordinarily, perhaps, the omission of this Court to discuss in its opinion an error assigned is no indication that consideration was not given to the point. Yet here the opinions are so extensive and exhaustive—and the point is of such importance—that such omission of discussion apparently indicates an omission to consider it.

This particular error is fully discussed in the brief submitted by appellant Buchalter upon the appeal, in Point V extending from pages 106 to 117, and citing authorities in point.

In a case where the judgment of conviction rests upon the testimony of such disreputable characters as Berger and Tannenbaum, it is a denial of "due process of law" to deprive the defendants of an opportunity to demonstrate conclusively, by the official, regularly kept records of the New York City Police Department, that neither of these men saw (or could have seen) Buchalter at 200 Fifth Avenue, on Friday, September 11, 1936, thus corroborating defendant's

ss Shapiro; or, at the very least, to demonstrate that is little or no likelihood that these men could have there as they falsely testified. With their credibility at issue, the defendant was entitled to the benefit of evidence bearing upon so vital a point. Here he was denied the right to the *record itself*, admissible as a record *truly kept* in the course of *official* business, and as well the opportunity to identify the police officers who made those records so that those officers might have been *legally* summoned by us as witnesses to tell what they observed or did not observe.

It is conceded that Buchalter was kept under constant surveillance during the time in question. Is it not obvious, therefore, that what was observed in the course of the trial by the officers who had him under surveillance, and which have weighed largely with the jury in determining the credibility of the prosecution witnesses?

Does the Court have misapprehended or overlooked the fact that the refusal to make available to the defendant those records which were concededly in the possession of the prosecution, was a denial of "due process of law"?

Conclusion

The process of law is no mere form of words. Therein is passed the whole of those priceless liberties for the preservation of which we are now engaged in mortal struggle. "Thus all fundamental rights comprised within the 'liberty' are protected by the Federal Constitution against invasion by the states" (Brandeis, J., in *Whitney v. California*, 274 U. S. 357, 373).

It is not "due process of law" that the form be preserved if the substance is denied.

Does the Court have misapprehended the essential vices inherent in the proceedings below. It has overlooked the fact that the defendant was brought to trial at a time and place when and where existed a public clamor from the streets of which no jury could have been immunized, and no jury was not. The attitude of the trial judge displayed animus against defendants and their counsel and a violent tenderness toward the prosecution and its witnesses which created an atmosphere so hostile to the defendant as to preclude the possibility of fair consideration

by the jury. In such an unwholesome atmosphere, the [fol. 4110] jury was directly misled—and in fact invited—into giving exaggerated importance to the prosecution's direct evidence, and to minimize, if not disregard, the evidence adduced upon cross-examination and by the defendant's witnesses.

In denial of due process of law, the value of the evidence was distorted so that the bias of the trial court was communicated to a jury already conditioned to convict.

"Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime" (Pound, J., later Chief Judge, in *Peo. v. Barbato*, 254 N. Y. 170, at 178).

Those great principles, this Court has said, "must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a *great criminal*, and yet be invoked for the purpose of sheltering an innocent man. *In the eye of the law all are innocent until convicted in accordance with the forms of the law and by a close adherence to its rules*" (Peckham, J., *Peo. v. Shary*, 107 N. Y. 427, at 476-477).

The motion for re-argument should be granted in the interest of sound law and public policy.

Respectfully submitted, I. Maurice Wormser, J. Bertram Wegman, Jesse Climenko, Of Counsel for Appellant, Louis Buchalter.

[fol. 4111] COURT OF APPEALS, STATE OF NEW YORK

Clerk's Office

I, John Ludden, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of The Respondents' Brief in Opposition to Motion for Reargument submitted by the District Attorney of Kings County in The People of the State of New York, Plaintiffs-Respondents, against Louis Buchalter, et al., Defendants-Appellants, with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this eighteenth day of December, A. D. 1942.

John Ludden, Clerk, by Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4112] COURT OF APPEALS, STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs-
Respondents,

against

LOUIS BUCHALTER, Alias "Lepke", EMANUEL WEISS, Alias
"Mendy Weiss", LOUIS CAPONE, Defendants-Appellants

RESPONDENTS' BRIEF IN OPPOSITION TO MOTION FOR
REARGUMENT

Statement

On October 30, 1942, this Court affirmed the judgment of the County Court of Kings County, dated December 2, 1941, convicting the appellants of the crime of Murder in the First Degree.

This motion for reargument of the appeal is made only by the appellant Buchalter. His motion is made upon the alleged ground "that this Court overlooked and misapprehended certain material and important facts and principles of law decisive of the case".

[fol. 4113] Point First

The motion for reargument is devoid of any merit.

In arriving at decision, this Court wrote exhaustive majority and dissenting opinions, which clearly show a most careful and conscientious consideration of the points raised by the appellants. The briefs on the appeal presented every conceivable point that could be made in their behalf. Buchalter's brief was 166 pages in length; Weiss' brief was 78 pages; Capone's main and supplemental briefs covered 284 pages. The oral argument of the appeal consumed approximately six hours. In both the briefs and the oral arguments the appellants were represented by exceptionally capable and highly experienced counsel, who

made a very forceful and thorough presentation of the facts and the legal principles involved in the case.

A reading of the notice of motion and the brief now submitted by the appellant Buchalter in support of his motion for reargument shows that he is merely reiterating, in different form, the arguments previously submitted. The moving papers and the brief contain nothing new, nor do they show that any point decisive of the case was ignored, misapprehended or overlooked.

1. Buchalter's first point, concerning his motions for a change of venue, was exhaustively discussed and argued at pages 7 to 12 and 52 to 88 of his brief. The answer to his arguments was presented at pages 45 to 49 of the people's brief. And the point was specifically discussed in the opinion of Judge Conway.

2. The same is true as to the second point. The argument now presented is a reiteration of the discussion appearing at pages 154 to 161 of Buchalter's brief and at pages 1 to 66 of Capone's brief. Here again the contentions were specifically discussed in the opinion of Judge Conway.

3. Buchalter's third point is likewise a reiteration of the arguments made on the original appeal. Those arguments were exhaustively developed at pages 97 to 153 of Buchalter's brief, at pages 55 to 64 of Weiss' brief, and at pages 84 to 87 and 99 to 107 of Capone's brief. The majority and dissenting opinions of this Court show that the points raised and the law applicable thereto were neither misapprehended nor overlooked.

4. Buchalter's fourth point is that Chief Judge Lehman "overlooked the rule that his own reasonable doubt of guilt necessarily required a reversal of the conviction". This is, indeed, a very amazing assertion. Chief Judge Lehman, in his concurring opinion, as set forth in the "unrevised and uncorrected" report, said:

"The verdict of the jury rests, it is plain, on the conclusion that the story of the people's witnesses is credible and furnished proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. * * * It has found the defendants guilty, and though I might have been unwilling, if I had been a member

of the jury, to concur in the verdict, I cannot as a judge say that the verdict is against the weight of the evidence. * * * Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind. All that is immaterial if the jury is convinced of guilt on sufficient evidence and no errors and defects [fol. 4115] affect the verdict. * * * Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm."

The decision of Chief Judge Lehman is in accord with the settled law applicable to capital cases. In *People v. Cignarella* (110 N. Y. 23) this Court, per Andrews, J., said at page 27:

"It is a cardinal principle in our jurisprudence that the jury is the ultimate tribunal for the investigation and determination of questions of fact. It is no more the province of an appellate court than of the court of original instance to determine controverted questions of fact arising upon conflicting evidence. Neither can lawfully usurp the appropriate function of the jury, and neither can substitute its own judgment for that of the jury where the facts are reasonably capable of diverse or opposing inferences."

Similarly, in *People v. Seidenschner* (210 N. Y. 341) this Court said at pages 358 to 359:

"Notwithstanding the testimony was somewhat unsatisfactory, and in some particulars contradictory, the conclusion had to be reached by determining the credibility of the witnesses produced, and as to which of two sets of witnesses were to be believed. The jury was required to make a determination upon the testimony before it. It is the province of the jury and not of the court to determine the truth from conflicting testimony, and within well-defined bounds to determine the relative weight of testimony.

[fol. 4116] "This court in *People v. Taylor* (138 N. Y. 398, 406) say: 'Under our system of criminal jurisprudence, it becomes the exclusive province of the jury to determine whether the evidence pointing to the guilt of the accused is so lacking in convincing force as to leave an intelligent and discriminating mind in doubt as to the truth of the charge contained in the indictment. When the jury, by their verdict, have declared that no such condition of

mental uncertainty has arisen from a contemplation of the evidence, the prisoner has had the full benefit of the rule of law which protects him from punishment, unless his crime is established beyond a reasonable doubt, and the question is not open for review in this court, unless the case is so weak that the verdict should be set aside because against the weight of evidence, or for other sufficient cause.' (See *People v. Katz*, 154 App. Div. 44-47; *affd.*, 209 N. Y. 311; *People v. Egnor*, 175 N. Y. 419-425; *People v. Rodawald*, 177 N. Y. 408-419; *People v. Decker*, 157 N. Y. 186-195.)

"In *People v. Ferraro* (161 N. Y. 365, 377) this court, referring to a determination of a question of fact, say: 'It would be hazardous for seven judges of the law * * * to say that the twelve judges of the fact were wrong * * *. It is impossible for us to say, and the nearest approach to justice that can be made is to leave such questions to the jury.'

"In *People v. Sanducci* (195 N. Y. 361, 367) this court say: 'The credibility of witnesses is necessarily for the twelve jurors who looked into their faces and heard them testify rather than for the seven judges who simply read the printed record of what they said'."

[fol. 4117] In *People v. Katz* (154 App. Div. 44; *affd.*, 209 N. Y. 311), cited with approval in the *Seidenschuer* case, *supra*, the rule is clearly stated as follows:

"It is not our duty to usurp the functions of the jury and to examine the evidence *de novo*, with a view to determining whether or not, on the same evidence, we should have arrived at the same result as that at which the jury arrived. So long as the verdict is not clearly against the evidence, as we think it is not in this case, * * * we cannot feel that it is our duty to reverse the conviction because, perchance, if we had been sitting as jurors we might have decided differently."

We say, therefore, that the appellant's fourth point is thoroughly lacking in merit.

5. Buchalter's final point was also previously argued and fully discussed in the original appeal. The discussion appears at pages 106 to 117 of Buchalter's brief and at pages 73 to 74 of Weiss' brief.

It is submitted that the motion papers and brief in support thereof are obviously insufficient. There is no showing "that some question, decisive of the case, and duly submitted by counsel, has been overlooked by the Court, or, that the decision is in conflict with an express statute, or, with a controlling decision, to which the attention of the court was not drawn, through the neglect or inadvertence of counsel". (*Mount v. Mitchell*, 32 N. Y. 702; *Marine National Bank v. National City Bank*, 59 N. Y. 67, 73; *Fosdick v. Town of Hempstead*, 126 N. Y. 651, 652.)

On the subject matter under consideration, this Court in *O'Brien v. Mayor, etc., of the City of New York* (142 [fol. 4118] N. Y. 671) declared, with striking applicability to the pending motion, as follows:

"The appellants upon this motion for a reargument have availed themselves of the opportunity to in effect reargue their whole case. In their ground for their application they have stated several reasons why such motion should be granted, but in truth they have failed to show any reasons exist for a reargument other than the claim that the court has plainly erred in its construction of the contract in question. We might, therefore, deny the motion on the ground that no reason recognized by the court has been shown for granting the motion (*Fosdick v. Town of Hempstead*, 126 N. Y. 651) * * *. The arguments contained in them, however, are nothing more than a reiteration and amplification of those which were addressed to us upon the original argument."

No inference that a point was overlooked, as contended by the appellant, can be drawn from the fact that it was not discussed in detail in the opinion. In *Terry v. Waitt* (56 N. Y. 91, 94) this Court emphasized that a reargument will not be granted because it failed to notice in its opinion every point urged, saying at page 94:

"Counsel are very apt to fall into the error of supposing that every point and suggestion in cases which they argue, is overlooked by the court when not specifically discussed and answered in a written opinion, and this error has, in several instances, led to applications like the present. They should reflect that *before a case is decided, the court is in* [fol. 4119] *the habit of deliberately considering it in all its*

bearings, and that when sanctioning a former decision the mere omission to notice and discuss in the opinion, supposed distinctions, if not sufficient to warrant the supposition that they have escaped observation."

Point Second

The motion for reargument should be denied.

Dated, Brooklyn, N. Y., November, 1942.

Respectfully submitted, Thomas Cradock Hughes,
Acting District Attorney, Kings County. Solomon
A. Klein, Henry J. Walsh, Assistant District At-
torneys, of Counsel.

[fol. 4120] Unrevised and Uncorrected—Not for Publication

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,

v.

LOUIS BUCHALTER et al., Appellants

(Decided November 25, 1942.)

Motions by Appellants Louis Buchalter, Emanuel Weiss and Louis Capone for reargument and motion by Appellant Louis Capone for a stay.

PER CURIAM:

This court considered the refusal of the trial court to accord the defendant access to the records of the Police Department of the City of New York. The records in question were deposited with this court at the time of the argument of the appeal and were examined. The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. The reports established that the defendant could and did elude the police at will. The ruling of the trial court was correct. (See *People ex rel. Lemon v. Supreme Court*, 245 N. Y. 24.)

This court did not restrict its review to a mere determination that there was no abuse of discretion as a matter

of law by the County Judge in denying the motion for a change of venue. A majority of the court is of the opinion that the discretion was properly exercised.

This court examined and found no error in the rulings of the trial court upon the challenges for implied bias. On the motion for a special jury under the statute (Judiciary Law, Cons. Laws, ch. 30 art. 18-B;) the defendant appeared by attorney and consented to be tried before such special jury, a majority of this court is of the opinion that he thereby consented also to the statutory provision that rulings of the trial court upon challenges for actual bias are final and not appealable.

Motions denied.

[fol. 4121] IN COURT OF APPEALS, STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appelas Hall in the City of Albany, on the twenty-fifth day of November A. D. 1942.

Present, Hon Irving Lehman, Chief Judge, Presiding.

THE PEOPLE &c., Respondent,

vs.

LOUIS BUCHALTER, Alias "Lepke", EMANUEL WEISS, Alias "Mendy Weiss" and Louis Capone, Appellants

A motion for re-argument of the above cause, having been heretofore made upon the part of the appellant Buchalter herein, and papers having been submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied.

A copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4122] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1942

No.

LOUIS BUCHALTER, Petitioner

v.

PEOPLE OF THE STATE OF NEW YORK

It is agreed by the attorneys for the petitioners and the District Attorney of Kings County of the State of New York, that so much of the record herein as consists of the voir dire examination of talesmen may be submitted to the Supreme Court of the United States, in connection with the petitioners' application for a writ of certiorari, in typewritten form, in which form it was heretofore, pursuant to the order of the Court of Appeals of the State of New York, made a part of this record and submitted to the Court of Appeals and in which form it was considered by the Court of Appeals.

For the purpose of identifying the typewritten transcript of the voir dire examination of talesmen here referred to, it is agreed that it is the typewritten transcript as reported by Julia A. McGowan and Thomas F. Darcy, Official Stenographers of the County Court of Kings County, that it consists of 2783 typewritten pages, in which are recorded the proceedings in the County Court of Kings County, Part 11, on August 4, 1941 and August 5, 1941, and of all the further proceedings had in this case in the said Court from September 15, 1941, to and through October 17, 1941.

Dated: New York, N. Y., December 15, 1942.

Thomas Cradock Hughes, Acting District Attorney,
by Henry J. Walsh, Assistant District Attorney;
Jesse Climenko, J. B. Wegman, Attorneys for
Petitioner, Louis Buchalter; Arthur Garfield
Hays, Alfred J. Talley, Lang & Anderson, Attorney
for Petitioner Emanuel Weiss; Sidney Rosenthal,
Attorney for Petitioner, Louis Capone.

[fol. 4123] [Stamp:] Office of the Clerk, Supreme Court, U.
S., Dec. 26, 1942

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

EMANUEL WEISS, Alias "Mendy" Weiss, Petitioner,
against

PEOPLE OF THE STATE OF NEW YORK, Respondent

It Is Hereby Stipulated and Agreed by and between the attorneys for the aforesaid Emanuel Weiss, alias "Mendy" Weiss, and the District Attorney for the County of Kings that the record on appeal in the above entitled matter in this Court include, in addition to the exhibits therein contained, the following, true copies of which are hereto annexed:

1. Order to show cause dated July 16, 1941 for a change in the place of trial, made on behalf of the aforesaid Emanuel Weiss;
2. Affidavit of James I. Cuff in support thereof dated July 15, 1941;
3. Copy of indictment attached thereto; and
4. Order of Mr. Justice Peter M. Daly dated August 1, 1941.

Dated: New York, December 23, 1942.

Arthur Garfield Hays, Attorney for Emanuel Weiss;
Thomas Cradock Hughes, Acting District Attorney
for County of Kings, State of New York.

[fol. 4124] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF KINGS

In the Matter of the Application of EMANUEL WEISS, to Remove the Trial of the Action of The People of the State of New York vs. Louis Buchalter, Alias "Lepke", Emanuel Weiss, Alias "Mendy Weiss", Harry Strauss, Alias "Pittsburgh Phil", James Feraco, Philip Cohen, Alias "Little Farvel", Louis Capone, to Another County

Upon the annexed affidavit of James I. Cuff sworn to the 15 day of July 1941, and the indictment her-in duly filed the 28th day of May 1940, and all the proceedings heretofore

had herein, let the District Attorney of Kings County show cause before this court at the Supreme Court held in and for the County of Kings at the courthouse thereof located at Fulton & Joralemon Streets, in the Borough of Brooklyn, City of New York, at a Special Term Part I thereof on the 18th day of July, 1941 at 10 o'clock in the morning of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein removing the trial of the indictment herein from the County Court of Kings County to the Supreme Court, held in another county, outside the City of New York, pursuant to Sections 344 and 346 of the Code of Criminal Procedure, and for such other and further relief as may be proper.

Let service of a copy of the within papers on the District Attorney of Kings County or one of his assistants or deputies, on July 16th 1941 be deemed sufficient.

[fol. 4125] Dated: New York, July 16th 1941.

Peter L. Daly, Justice of the Supreme Court.

[fol. 4126] SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF KINGS

In the Matter of the Application of EMANUEL WEISS to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county

STATE OF NEW YORK,

County of New York, ss:

James L. Cuff, being duly sworn, deposes and says:

I am attorney for Emanuel Weiss, named as a defendant in the indictment, a copy of which is annexed hereto and marked Exhibit "A" hereof.

This affidavit is made in support of a motion for an order removing the above entitled action from the County Court of Kings County for trial in a county outside the City of New York on the ground that a fair and impartial trial cannot be had in Kings County.

I respectfully submit that a fair and impartial trial cannot be accorded the defendant Weiss, named in this case

as a co-defendant of Louis Buchalter, and who is accused with that defendant and others of having participated in the murder of one Joseph Rosen.

This application is for a change of venue and is made coincidentally with the making of an identical application on behalf of the defendant Buchalter.

[fol. 4127] I have read the affidavits of Hyman Barshay and Benjamin D. Fernbach, both sworn to the — day of July 1941 and the exhibits annexed thereto, to be submitted in support of the motion for change of venue on behalf of the defendant Buchalter. I believe, after reading the facts set forth in those affidavits and from my knowledge of local opinion, that a fair trial cannot be accorded the defendant Buchalter in this jurisdiction at this time. I believe also that any person who like the defendant Weiss whom I represent, must proceed to trial as a co-defendant of the defendant Buchalter, cannot obtain a fair trial in this jurisdiction at this time.

I believe that the defendant Weiss will be prejudiced by the mere assertion embodied in the indictment that he acted in concert with the defendant Buchalter.

I believe that the public generally has been taught that the defendant Buchalter is an arch criminal and that anyone who is alleged to have acted in complicity with him must therefore be regarded as presumptively guilty.

I believe, that if the defendant Weiss is required to stand trial in Kings County in the month of August, 1941, and this case is now set for trial on August 4th, 1941, that a jury would regard him as presumptively guilty rather than presumptively innocent. I believe that the doctrine of the presumption of innocence would be no more than an empty doctrine were this trial to be held at that time and place.

[fol. 4128] I believe that a defendant is not accorded a fair trial if local conditions are such as to require him to demonstrate his innocence. I believe that the tenor of public opinion in Kings County at this time is such that unless a defendant, like the defendant Weiss, who must stand trial as an alleged associate of the defendant Buchalter proves his innocence, he will be found guilty. In such circumstances, the fundamental principle that a defendant is presumed innocent unless proved guilty beyond a reasonable doubt, has no practical value.

For these reasons I respectfully submit that a fair trial cannot be accorded my client in Kings County at this time,

these reasons I respectfully submit this affidavit of the application for a change of venue.

The application for this or any similar relief has been made on behalf of the defendant Weiss.

The application is made by order to show cause rather than the giving of the ordinary notice of motion for judgment, that the trial of this action is now scheduled for the 4th day of August 1941, and I desire to make this application as expeditiously as possible and to have it heard by this court as long before the 4th day of August as may be possible.

James I. Cuff.

Subscribed and sworn to before me this 15 day of July, 1941. Claire Schultz, Notary Public, Queens County, Queens County, Clerk's No. 8806, Reg. No. 4233. N. Y. Co. Clerk's No. 2114, Reg. No. 281232. Commission Expires March 30, 1942.

IN COUNTY COURT,

County of Kings:

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

against

CHARLES, ALIAS "LEPKE," EMANUEL WEISS, ALIAS "Eddie Weiss," Harry Strauss, Alias "Pittsburgh James Feraco, Philip Cohen, Alias "Little Fardone, Louis Capone, Defendants

Grand Jury of the County of Kings, by this indictment charge the defendants of the crime of murder in the second degree, committed as follows:

That the defendant on or about September 13, 1936, in the County of Kings, willfully, feloniously and of malice aforethought shot and killed Joseph Rosen with revolvers.

William O'Dwyer, District Attorney.

Indictment filed May 28, 1940. John B. Maione, Foreman.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings.

of Kings, at the Courthouse thereof, Borough of Brooklyn, City of New York, on the 1 day of August, 1941.

Present: Hon. Peter M. Daly, Justice.

In the Matter of the Application of EMANUEL WEISS to remove the trial of the action of The People of the State of New York vs. Louis Buchalter, alias "Lepke", Emanuel Weiss, alias "Mendy Weiss", Harry Strauss, alias "Pittsburgh Phil", James Feraco, Philip Cohen, alias "Little Farvel", Louis Capone, to another county.

The above-named defendant, Emanuel Weiss, having applied to this Court for an order granting a change of venue of the trial of this action, and the said application having duly come to be heard on the 18th day of July, 1941,

Now, on reading and filing the order to show cause, issued out of this Court on the 16th day of July, 1941; the affidavit of James L. Cuff, duly verified the 15th day of July, 1941, submitted in support of said order to show cause; the affidavits of Solomon A. Klein and Burton B. Turkus, both duly verified the 21st day of July, 1941, submitted in opposition to said application, and upon all other papers and proceedings had herein, and after hearing James L. Cuff, Esq., of counsel for defendant, Weiss, in support of said application, and Solomon A. Klein, assistant district attorney, in opposition thereto, and upon filing the opinion of [fol. 4131] the Court, and due deliberation having been had, it is on motion of William O'Dwyer, District Attorney of Kings County,

Ordered, that the said motion be and the same hereby is in all respects denied.

Enter.

Peter M. Daly, J. S. C.

Granted August 1, 1941. Francis J. Sinnott, Clerk.

Filed August 5, 1941.

[fol. 4129] COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs-
Respondents,

against

LOUIS BUCHALTER, EMANUEL WEISS and LOUIS CAPONE,
Defendants-Appellants

SIR:

Please Take Notice that upon the record and briefs herein filed and submitted to the Court on behalf of the appellant Emanuel Weiss, and upon the notice of motion herewith, and upon the decision and opinions of the Court dated the 30th day of October, 1942 affirming the conviction of the appellant Emanuel Weiss, and upon the brief annexed to the notice of motion for reargument on behalf of the appellant Louis Buchalter, the said motion being returnable simultaneously herewith, a motion will be made in the Court of Appeals at the courthouse in the City of Albany on the 23rd day of November 1942 at two o'clock in the afternoon, or as soon thereafter as counsel may be heard, for a reargument of said appeal upon the ground set forth in the notice of motion submitted on behalf of the appellant Louis Buchalter on the said motion for reargument.

Dated: New York, November 17th, 1942.

Yours, etc., Alfred J. Talley, 40 Wall Street, Borough
of Manhattan, New York City; James I. Cuff, 99
John Street, Borough of Manhattan, New York
City; M. M. Kreindler, 51 Chambers Street, Bor-
ough of Manhattan, New York City, Attorneys for
Defendant-Appellant, Emanuel Weiss.

To: Honorable Thomas Cradock Hughes, Acting Dis-
trict Attorney of Kings County, Municipal Building, Bor-
ough of Brooklyn, New York City.

[fol. 4130] STATE OF NEW YORK,
In Court of Appeals:

At a Court of Appeals for the State of New York, held
at Court of Appeals Hall, in the City of Albany, on the
twenty-fifth day of November A. D. 1942.

Present, Hon. Irving Lehman, Chief Judge, presiding.

THE PEOPLE &c., Respondent,

vs.

LOUIS BUCHALTER, Alias "Lepke"; EMANUEL WEISS, Alias
"Mendy Weiss",

and

LOUIS CAPONE, Appellants

A Motion for a re-argument of the above cause, having
been heretofore made upon the part of the appellant Weiss
herein, and papers having been duly submitted thereon, and
due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is
denied.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

[fol. 4131] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1942

No. 606

ORDER GRANTING CERTIORARI—March 15, 1943

On Petition for Writ of Certiorari to the County Court
of Kings County, State of New York.

A petition for rehearing having been filed in this case
upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court
that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying cer-
tiorari be, and the same is hereby, vacated; and that the
petition for writ of certiorari herein be, and the same is
hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 4132] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 610

ORDER GRANTING CERTIORARI—March 15, 1943

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 4133] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 619

ORDER GRANTING CERTIORARI—March 15, 1943

On Petition for Writ of Certiorari to the County Court of Kings County, State of New York.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; ~~and~~ that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy and Mr. Justice Jackson took no part in the consideration or decision of this application.